

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912. 1913

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No. ~~878~~ **395**

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN A. DAVIS AND WILLIAM B. DAVIS.

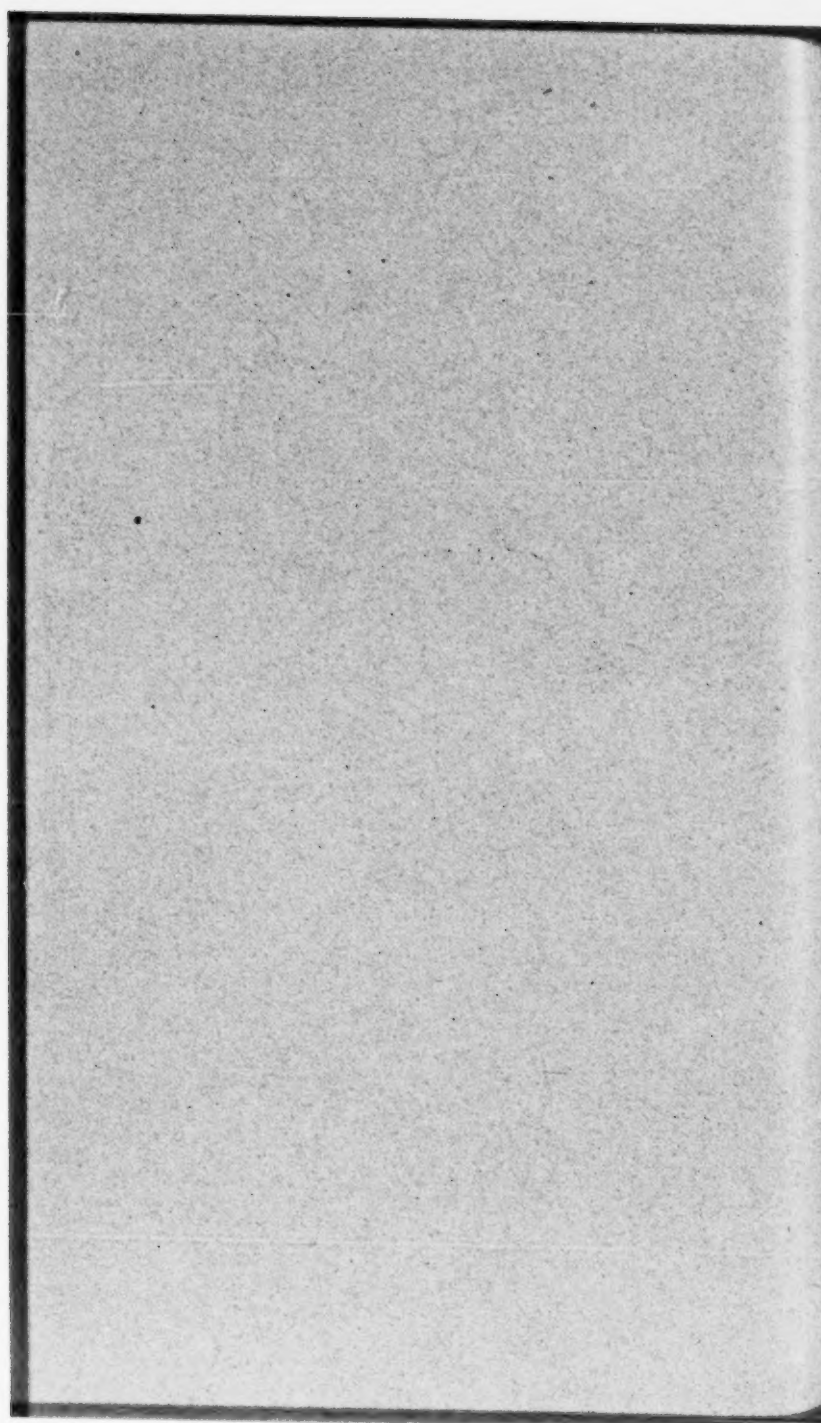
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI.

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**FILED DECEMBER 11, 1912.**

(23453)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 878.

THE UNITED STATES, PLAINTIFF IN ERROR.

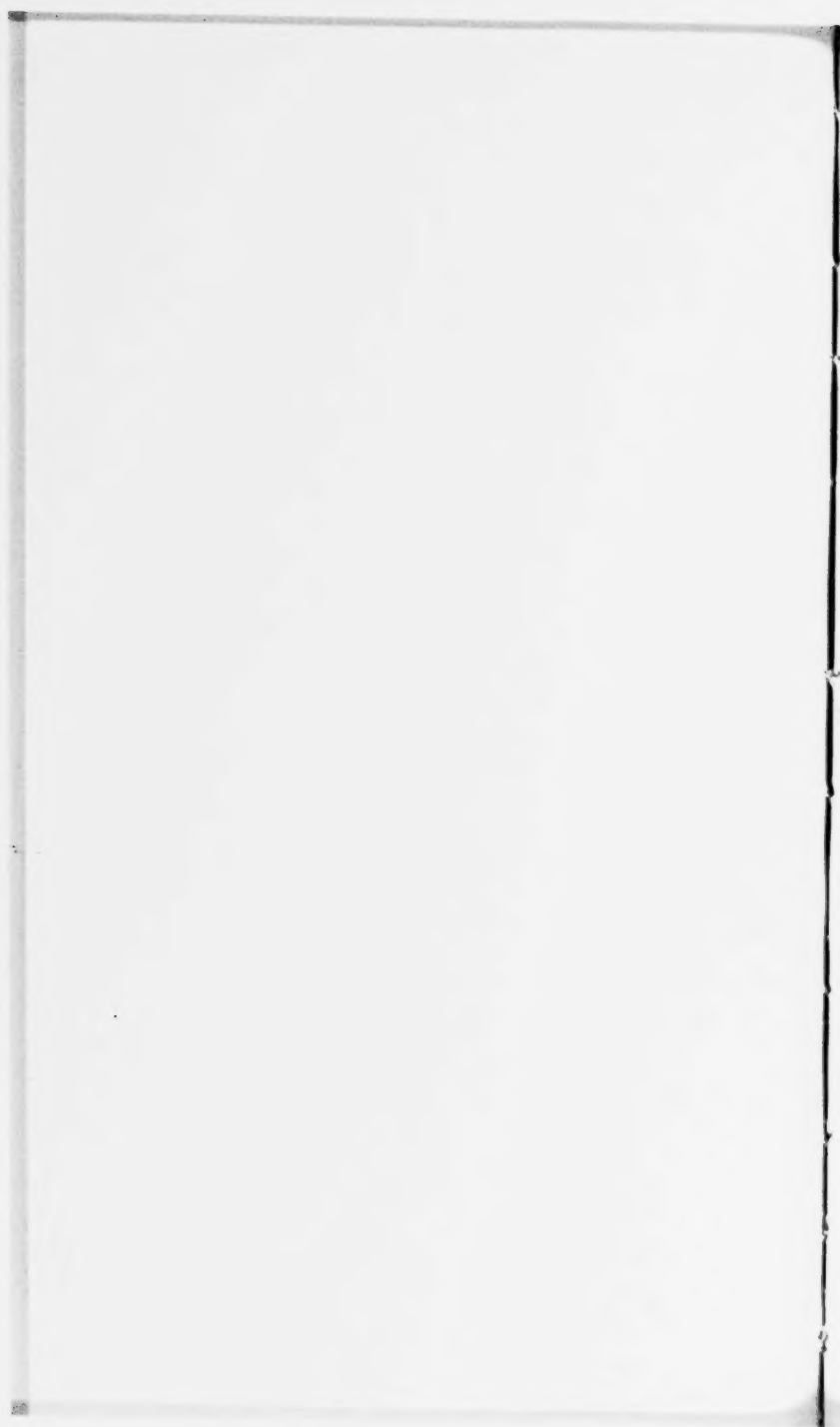
vs.

JOHN A. DAVIS AND WILLIAM B. DAVIS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI.

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1 In the District Court of the United States for the Southern Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS.

No. 2584.

Be it remembered that on the 1st day of April, 1912, in said District Court of the United States for the Southern Division of the Western District of Missouri, proceedings were had and entry of record made as follows:

Southern Division of the Western District of Missouri.

1912, April 1st.

Be it remembered that at a regular term of the District Court of the United States in and for the Southern Division of the Western District of Missouri begun and held at the city of Springfield in said division and district, and in the United States court room, on Monday, the first day of April, A. D. 1912, there were present as follows, to wit: Hon. Arba S. Van Valkenburgh, U. S. Judge; Hon. A. J. Martin, United States marshal; Hon. Leslie J. Lyons, United States attorney; Hon. Thad B. Landon, asst. U. S. attorney; Hon. Hugh C. Smith, asst. U. S. attorney; Hon. John B. Warner, clerk, and George Pepperdine, deputy.

Court met pursuant to law and adjournment. And the following proceedings were had:

And afterwards, to wit, on the 3rd day of April, A. D. 1912, the same being the third judicial day of said April term of court, and while said court was in session, entry of record appears in said court as follows:

Southern Division of the Western District of Missouri.

1912, April 3.

THE UNITED STATES

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS.

No. 2584. Violation of section # 37, Penal Code.

2 Now on this day comes the grand jury and in open court makes presentment as follows: The United States vs. John A. Davis and William B. Davis, violation of section 37, Penal Code. A true bill; John W. Robertson, foreman, which said bill of indictment is filed, and which said indictment so returned into court and filed is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,

*Southern Division of the Western District of Missouri, ss:*

In the District Court of the United States for the Southern Division of the Western District of Missouri.

The grand jurors of the United States of America, duly and legally selected, chosen, and drawn from the body of the Southern

Division of the Western District of Missouri, and duly and legally examined, empaneled, sworn, and charged to inquire of and concerning crimes and offenses against the United States within and for the Southern Division of the Western District of Missouri, at the April, 1912, term thereof, on their oaths present and charge that on or about the first day of June, 1909, at Buffalo, Dallas County, Missouri, and within the Southern Division of the Western District of Missouri, one John A. Davis and one William B. Davis and divers and sundry other persons to the grand jurors unknown, named as defendants herein, unlawfully, wilfully, knowingly, and feloniously did conspire together to commit an offense against the United States, to wit, to unlawfully, wilfully, knowingly, and feloniously utter and publish as true, and cause to be uttered and published as true, well knowing the same to be false and untrue, with the unlawful intent to defraud the United States, the false, fraudulent, and untrue affidavit and assignment of Mary A. Forrester, which said affidavit and assignment is in words and figures as follows, to wit:

3 STATE OF MISSOURI.

*County of St. Francois, ss:*

I, Mary A. Forester, of Farmington, county of St. Francois, State of Missouri, do solemnly swear that I am the lawful widow of Michael Forester, deceased, who was the identical person who was mustered into the military service of the United States under the name of Michael Forester, a private in Co. I, Reg. 149, Illinois Volunteers, on the 6th day of February, 1865, and was honorably discharged from such service on the 27 day of January, 1866, and died on the 23 day of December, 1891, and I and my deceased husband have always been loyal to the United States.

I furthermore solemnly swear that I am the widow of the said Michael Forester, deceased, who was the identical person who made original homestead entry No. 9004 on the 19 day of January, 1872, for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  section 13, township 43 N., range 3 E., at the United States land office, at Boonville, Missouri; I am a citizen of the United States; that I nor my late husband have made no prior application for additional homestead entry under the provisions of section 2306 and 2307 of the Revised Statutes of the United States; nor has a certificate of right of entry been issued to him nor to me and that I have not, nor has he, heretofore disposed in any manner of our right of entry granted by said section 2306 and 2307, and that I have not, nor has he, in any manner exercised our right of homestead, except as above stated, either before or since the 22nd day of June, 1874, and that I have this day for a valuable consideration sold and assigned my said right of entry to W. B. Davis, his heirs and assigns, in accordance with an assignment hereto attached.

(If corroborating witnesses who knew the claimant's husband while in service can not be found, so state the facts here.)

MARY E. FORRESTER.

(Two witnesses to signature:)

Mrs. ANNA NEY.

JOHN E. BRAGG.

Subscribed and sworn to before me this 15 day of September, 1908.

[SEAL.]

WILLIAM A. KENNEDY,

*Notary Public, Farmington, Mo.*

Term expires Oct. 8, 1910.

4 STATE OF MISSOURI,

*County of St. Francois:*

C. F. Thatcher and M. A. Bragg, being first duly sworn, deposes and say: That they were well acquainted with Michael Forester (late husband of Mary A. Forrester) for 30 years prior to his death, and knew him to be the identical person who served more than 90 days in Co. I, Regt. 149, III. Volunteers, during the War of the Rebellion, who made homestead entry No. 9004 at the Boonville, Missouri U. S. land office; that we have been acquainted with Mary A. Forester, widow of Michael Forester, for 30 years and know that she was the lawful wife of said Michael Forester, and that he know that the said Michael Forester, late husband of Mary A. Forester, died on the 23d day of December, 1891, and said Mary A. Forester has not remarried since the death of her said husband; that from their acquaintance with him and with the affiant, they have reason to know and do know that her statements made in the above affidavit are true.

M. A. BRAGG,

(My post-office address is Farmington, Mo.)

C. F. THATCHER,

(My post-office address is Farmington, Mo.)

Subscribed and sworn to before me this 15th day of September, 1908.

[SEAL.]

WILLIAM A. KENNEDY,

*Notary Public, Farmington, Mo.*

My term expires Oct. 8, 1910.

And which said affidavit and assignment are false, fraudulent, and untrue in this, that it is stated in said assignment that the said Michael Forester was the identical person who made original homestead entry number 9004 on the 19th day of January, 1872, for the west half of the southeast quarter of section thirteen, township forty-three north, range three east, at the United States land office at Boonville, Missouri, whereas in truth and in fact the said Michael Forester was not the identical person who made original homestead entry number 9004 on the 19th day of January, 1872, for the west half of the southeast quarter of section thirteen, township forty-three, range

three east, at the United States land office at Booneville, Missouri, but that said entry was made by Michael Foerstel, another and different person than Michael Forester, all of which was then  
 5 and there and at all times well known to the said defendants; and which said false and fraudulent affidavit and assignment constituted and was intended to be used as proof of, and to accompany as a part thereof, the false and fraudulent widow's additional homestead entry right of Mary A. Forester, all of which was at all times well known to the said defendants.

And to effect the object of the said conspiracy, the defendant John A. Davis did on or about the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, at the Southern Division of the Western District of Missouri, and within the jurisdiction of this court, make and execute a certain written instrument, whereby as stated therein, he did for value received, sell, assign, and transfer to Gertrude E. Platt the false and fraudulent right to a widow's additional homestead entry of Mary A. Forester, widow of Michael Forester, and the said false, fraudulent, and untrue assignment of the said Mary A. Forester so accompanying the said homestead entry right and a part thereof.

And further to effect the object of said conspiracy the said defendants John A. Davis and William B. Davis did on the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, in said division and district, make and execute their certain instrument in writing, whereby they did guarantee unto Gertrude E. Platt of Rosewell, New Mexico, the eighty-acre soldier's additional homestead right of Michael Forester, and that the said Michael Forester made the original homestead entry as set forth in the aforesaid affidavit and assignment, and that the said right was a valid and locatable right to enter eighty acres of public land, subject to homestead appropriation, and that if for any reason the said right should prove invalid, and non-locatable, then that the said defendants should replace the said right with eighty acres of good and valuable script or refund the purchase price so paid for said right of entry in cash, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

## SECOND COUNT.

And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge that on or about the first day of June, 1909, at Buffalo, Dallas County, Missouri, and within the Southern Division of the Western District of Missouri, one John A. Davis and one William B. Davis, and divers and sundry other persons to the grand jurors unknown, named as defendants herein, unlawfully, knowingly, wilfully and feloniously did conspire together to commit an offense against the United States, to wit, to unlawfully, wilfully, knowingly, and feloniously utter and publish as true, and cause to be uttered and published as true, well knowing the same to be false and



untrue, with the unlawful intent to defraud the United States, the false, fraudulent, and untrue affidavit and assignment of Mary A. Forester, which is in words and figures as follows, to wit:

ASSIGNMENT.

Whereas the undersigned Mary A. Forester is entitled to an additional entry of 80 acres of public land under and by virtue of the provisions of section 2306 of the Revised Statutes of the United States, as shown by the accompanying proof, being additional to my husband's original homestead entry of W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  section 13, township 43 N., range 3 E., Boonville, Mo.:

And whereas she has this day sold said right of entry to W. B. Davis and has received full payment therefor, the receipt whereof is hereby acknowledged:

Now, this assignment witnesseth, for value received, I, Mary A. Forester do hereby sell, assign, and transfer to the said William B. Davis and to his heirs and assigns forever my right to make entry of 80 acres of public land to which I am entitled under the provisions of section 2306 as aforesaid, and authorize him, the said William B. Davis, his heirs and assigns, to make such entry of public and receive a patent therefor, this assignment being made for the express purpose of divesting the undersigned of his right to make an additional entry of public land under the provisions of section 2306 as aforesaid, and to vest such right of entry in the said William B. Davis, his heirs, and assigns forever.

7 Signed, sealed, and delivered this 15th day of September, 1908.

MARY A. FORRESTER. [SEAL.]

Witnesses:

Mrs. ANNA NEY,  
JOHN E. BRAGG.

STATE OF MISSOURI, *County of St. Francois, ss:*

On this 15th day of September, 1908, before me personally came Mary A. Forrester, to me well known as the person who executed the foregoing assignment and the accompanying proof, and acknowledged the foregoing assignment to be his act and deed for the purpose herein named.

[SEAL.]

WILLIAM A. KENNEDY,  
*Notary Public, Farmington, Mo.*

Term expires Oct. 8, 1910.

And which said assignment is false, fraudulent, and untrue in this, that it is stated therein that the said Mary A. Forrester is entitled to an additional entry of eighty acres of public land under and by virtue of the provisions of section 2306 of the Revised Statutes of the United States as shown by the accompany proofs, being additional to her husband's original homestead entry of the west half

of the southeast quarter of section thirteen, township forty-three north, range three east, Boonville, Missouri, whereas in truth and in fact the said Mary A. Forrester was not entitled to an additional entry of eighty acres of public land under and by virtue of the provisions of section 2306 of the Revised Statutes of the United States, based upon the husband's original homestead entry as therein stated, for the reason that her said husband, Michael Forester, did not, as therein stated, make the original homestead entry for the west half of the southeast quarter of section thirteen, township forty-three north, range three east, at Boonville, Missouri, but that the said entry was made by Michael Foerstel, another and different person than the said Michael Forester, all of which was then and there at all times well known to the said defendants.

8 And to effect the object of the said conspiracy, the defendant John A. Davis did on or about the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, at the Southern Division of the Western District of Missouri, and within the jurisdiction of this court, make and execute a certain written instrument, whereby as stated therein, he did for value received, sell, assign and transfer to Gertrude E. Platt the false and fraudulent right to a widow's additional homestead entry of Mary A. Forrester, widow of Michael Forester, and the said false, fraudulent and untrue affidavit and assignment of the said Mary A. Forrester so accompanying the said homestead entry right and a part thereof.

And further to effect the object of said conspiracy the said defendants John A. Davis and William B. Davis did on the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, in said division and district, make and execute their certain instrument in writing, whereby they did guarantee unto Gertrude E. Platt, of Roswell, New Mexico, the eighty acre soldier's additional homestead right of Michael Forester, and that the said Michael Forester made the original homestead entry as set forth in the aforesaid affidavit and assignment, and that the said right was a valid and locatable right to enter eighty acres of public land, subject to homestead appropriation, and that if for any reason the said right should prove invalid and nonlocatable, then that the said defendants should replace the said right with eighty acres of good and valuable script or refund the purchase price so paid for said right of entry in cash, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.

And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge that on or about the first day of June, 1909, at Buffalo, Dallas County, Missouri, and within the Southern Division of the Western District of Missouri, one John A. Davis and one William B. Davis, and divers and sundry other persons to the grand jurors unknown, named as defendants herein, unlawfully,

knowingly, wilfully, and feloniously did conspire together to commit an offense against the United States, to wit, to unlawfully, wilfully, knowingly, and feloniously utter and publish as true, and cause to be uttered and published as true, well knowing the same to be false and untrue, with the unlawful intent to defraud the United States, the false, fraudulent, and untrue affidavit of Alfred F. Yates, which is in words and figures as follows, to wit:

## GENERAL AFFIDAVIT.

STATE OF MISSOURI, *County of Butler, ss:*

In the matter of Michael Foerstel, alias Michael Forester, personally came before me a notary public in and for the county and State aforesaid, Alfred F. Yates, aged 67 whose residence and post-office address is Neelyville, Mo., well known to me to be reputable and entitled to credit, and who being duly sworn, declares in relation to aforesaid case as follows: That I was well and personally acquainted with Michael Foerstel or Michael Forester, who are one and the same person, that Michael Foerster served in the United States servi's in Company I, 149 Regiment Illinois Volunteer Infantry, and he was always loyal to the United States and he made homestead in section thirteen, township forty-three north, range three east, to wit, W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  at Boonville, Mo., at United States land office, all of this I know to be true.

He further declares that he has no interest, either direct or indirect, in the prosecution of said claim.

ALFRED F. YATES.  
(Affiant sign here.)

If affiant signs by mark, two persons who can write must sign here.

10 Sworn to and subscribed before me, this 26th day of June, A. D. 1908.

I certify that said affiant is a reliable person; that the contents of the foregoing affidavit were fully made known to him before swearing thereto, including the words ———— erased, and the words ———— added, and that I have no interest, direct or indirect, in the prosecution of said claim.

My term expires April 1st, 1911.

[L. S.] HARRY BAEDSLEY, *Notary Public*.

And which said affidavit is false, fraudulent, and untrue in this: That it is stated therein by the said Alfred F. Yates that he was well and personally acquainted with Michael Foerstel, or Michael Forester, who were one and the same person, and that the said Michael Forester made a homestead entry for the west half of the southeast quarter of section thirteen, township forty-three north, range three east, at Boonville, Missouri, land office, where as in truth and in fact the said Michael Foerstel and Michael Forester were not one and the same person, but were two different persons; and the said Michael Forester did not make a homestead entry to the west half of the

southeast quarter of section thirteen, township forty-three north, range three east, at Boonville, Missouri, but that said entry was made by Michael Foerstel, another and a different person than Michael Forester, and which said false and fraudulent affidavit constituted and was intended to be used as proof of and to accompany as a part thereof, the false and fraudulent widow's additional homestead entry right of Mary A. Forrester, all of which was at all times well known to the said defendants. And to effect the object of the said conspiracy, the defendant John A. Davis did, on or about the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, at the Southern Division of the Western District of Missouri, and within the jurisdiction of this court, make and execute a certain written instrument, whereby as stated therein, he did for value received, sell, assign, and transfer to Gertrude E. Platt the false and fraudulent right to a widow's additional homestead entry of Mary A. Forrester, widow of Michael Forester, and the said false, fraudulent, and untrue affidavit and assignment of the said Mary A.

11 Forrester so accompanying the said homestead entry right and a part thereof.

And further to effect the object of said conspiracy the said defendants John A. Davis and William B. Davis did, on the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, in said division and district, make and execute their certain instrument in writing, whereby they did guarantee unto Gertrude E. Platt, of Roswell, New Mexico, the eighty-acre soldier's additional homestead right of Michael Forester, and that the said Michael Forester made the original homestead entry as set forth in the aforesaid affidavit and assignment, and that the said right was a valid and locatable right to enter eighty acres of public land, subject to homestead appropriation, and that if for any reason the said right should prove invalid, and non-locatable, then that the said defendants should replace the said right with eighty acres of good and valuable script or refund the purchase price so paid for said right of entry in cash, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

#### FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that on or about the first day of June, 1909, at Buffalo, Dallas County, Missouri, and within the Southern Division of the Western District of Missouri, one John A. Davis and one William B. Davis, and divers and sundry other persons to the grand jurors unknown, named as defendants herein, unlawfully, wilfully, knowingly, and feloniously did conspire together to commit an offense against the United States, to wit, to unlawfully, wilfully, knowingly, and feloniously transmit to and present at, and cause and procure to be transmitted to and presented at the land office of the United States of America, at Roswell, New Mexico, the same

being an officer of the United States, well knowing the same to be false, fraudulent, and untrue, and with the unlawful intent to defraud the United States, the certain false, fraudulent, and untrue affidavit and assignment of Mary A. Forrester, which is in words and figures as follows, to wit:

## STATE OF MISSOURI,

*County of St. Francois, ss:*

12 I, Mary A. Forester, of Farmington, county of St. Francois, State of Missouri, do solemnly swear that I am the lawful widow of Michael Forester, deceased, who was the identical person who was mustered into the military service of the United States under the name of Michael Forester, a private in Co. I, Reg. 149 Illinois Volunteers, on the 6th day of February, 1865, and was honorably discharged from such service on the 27 day of January, 1866, and died on the 23 day of December, 1891, and I and my deceased husband have always been loyal to the United States.

I furthermore solemnly swear that I am the widow of the said Michael Forester, deceased, who was the identical person who made original homestead entry, No. 9004, on the 19 day of January, 1872, for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  section 13, township 43 N., range 3 E., at the United States land office, at Boonville, Missouri; I am a citizen of the United States; that I nor my late husband have made no prior application for additional homestead entry under the provision of section 2306 and 2307 of the Revised Statutes of the United States; nor has a certificate of right of entry been issued to him nor to me; and that I have not, nor has he, heretofore disposed in any manner of our right of entry granted by said section 2306 and 2307; and that I have not, nor has he, in any manner exercised our right of homestead, except as above stated, either before or since the 22nd day of June, 1874, and that I have this day for a valuable consideration sold and assigned my said right of entry to W. B. Davis, his heirs and assigns, in accordance with an assignment hereto attached.

(If corroborating witnesses who knew the claimant's husband while in service can not be found, so state the facts here.)

MARY A. FORRESTER.

(Two witnesses to signature.)

Mrs. ANNA NEY.

JOHN E. BRAGG.

Subscribed and sworn to before me this 15 day of September, 1908.

[SEAL.]

WILLIAM A. KENNEDY.

*Notary Public, Farmington, Mo.*

Term expires Oct. 8, 1910.

## STATE OF MISSOURI,

*County of St. Francois:*

C. F. Thatcher and M. A. Bragg, being first duly sworn, deposes and say: That they were well acquainted with Michael Forester

(late husband of Mary A. Forrester) for 30 years prior to his death, and knew him to be the identical person who served more than 13 90 days in Co. I, Regt. 149 Ill. Volunteers, during the War of the Rebellion, who made homestead entry No. 9004, at Boonville, Missouri, U. S. land office; that we have been acquainted with Mary A. Forester, widow of Michael Forester, for 30 years, and know that she was the lawful wife of the said Michael Forester, and that we know that the said Michael Forester, late husband of Mary A. Forester, died on the 23 day of December, 1891, and said Mary A. Forester has not remarried since the death of her said husband; that from their acquaintance with him and with the affiant they have reason to know and do know that her statements made in the above affidavit are true.

M. A. BRAGG.

(My post-office address is Farmington, Mo.)

C. F. THATCHER.

(My post-office address is Farmington, Mo.)

Subscribed and sworn to before me this 15 day of September, 1908.

[SEAL.]

WILLIAM A. KENNEDY,

*Notary Public, Farmington, Mo.*

Term expires Oct. 8, 1910.

And which said affidavit and assignment is false, fraudulent, and untrue in this, that it is stated in said assignment that the said Michael Forester was the identical person who made original homestead entry number 9004 on the 19th day of January, 1872, for the west half of the southeast quarter of section thirteen, township forty-three north, range three east, at the United States land office at Boonville, Missouri, whereas in truth and in fact the said Michael Forester was not the identical person who made original homestead entry number 9004 on the 19th day of January, 1872, for west half of the southeast quarter of section thirteen, township forty-three north, range three east, at the United States land office at Boonville, Missouri, but that said entry was made by Michael Foerstel, another and different person than Michael Forester, and which said false, fraudulent, and untrue affidavit and assignment, as was well known to the said defendants, was intended to be used and was used in support of and in relation to the claim of one Gertrude E. Platt, and her assigns, to enter upon eighty acres of land belonging to the United States of America, and subject to homestead entry, and to receive from the United States a patent to the land entered. The aforesaid claim was based upon the false and fraudulent widow's additional homestead right of Mary A. Forrester, the widow of Michael Forester, as additional to original homestead entry No. 9004, on the west half of the southeast quarter of section thirteen, township forty-three north, range three east, entered at the United States land office at Boonville, Missouri, January 19th, 1872, all of which was at all times well known to the said defendants.

And to effect the object of the said conspiracy, the said John A. Davis did on or about the 18th day of June, 1909, at Buffalo, Dallas

County, Missouri, at the Southern Division of the Western District of Missouri, and within the jurisdiction of this court, make and execute a certain written instrument, whereby as stated therein, he did for value received sell, assign, and transfer to Gertrude E. Platt the false, fraudulent, and untrue affidavit and assignment of the said Mary A. Forrester so accompanying the said homestead entry right and a part thereof, and which was intended to be used and was in support of and in relation to the aforesaid claim of Gertrude E. Platt and her assigns, to enter upon eighty acres of the land of the United States as aforesaid.

And further to effect the object of said conspiracy the said defendants John A. Davis and William B. Davis did on the 18th day of June, 1909, at Buffalo, Dallas County, Missouri, in said division and district, make and execute their certain instrument in writing, whereby they did guarantee unto Gertrude E. Platt, of Roswell, New Mexico, the eighty-acre soldier's additional homestead right of Michael Forester, and that the said Michael Forester made the original homestead entry as set forth in the aforesaid affidavit and assignment, and that the said right was a valid and locatable right to enter eighty acres of public land, subject to homestead appropriation, and that if for any reason the said right should prove invalid and non locatable, then that the said defendants should replace the said right with eighty acres of good and valuable script or refund the purchase price so paid for said right of entry in cash, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

THAD B. LONDON,

*Assistant U. S. Attorney.*

15 Which said indictment is endorsed: A true bill. Jno. W. Robertson, foreman of the grand jury. Filed April 3, 1912. John B. Warner, clerk, by George Pepperdine, deputy. Leslie J. Lyons, U. S. attorney. Witnesses: R. C. Willis, Mary A. Forrester, W. A. Kennedy, Michael Foerstel, Gertrude E. Platt, and Harry Barasley.

And on the same day, to wit, on the 3rd day of April, 1912, and during the session of said court, proceedings were had and entry of record made as follows:

THE UNITED STATES	} Violation of section 37, Penal Code.
<i>vs.</i>	
JOHN A. DAVIS AND WIL-	
LIAM B. DAVIS.	

And now on this day it is ordered by the court that a capias issue in this cause for the arrest of the said defendants, whereupon said capias is issued and placed in the hands of the marshal for service. It is further ordered that the bond of each of said defendants be fixed at the sum of twenty-five hundred dollars, and that the same may be approved by the United States commissioner, and that for the present this cause be passed.

12 UNITED STATES VS. JOHN A. DAVIS AND WILLIAM B. DAVIS.

And afterwards, to wit, June 5th, 1912, entry of record appears in said cause as follows:

Southern Division of the Western District of Missouri,

1912, June 5.

THE UNITED STATES vs. JOHN A. DAVIS ET AL.	}	=2584. Violation sec. 37, Penal Code.
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Now on this day the capias heretofore issued in this case is returned and filed, and on the same appears the return of the marshal, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,

*Southern Division of the Western District of Missouri, ss:*

I hereby certify that I executed this writ by taking the body of the within-named John A. Davis, whereupon the said John A. Davis presented bond in the sum of \$2,500.00, and said bond being approved by George Pepperdine, U. S. commissioner, he, the said John A. Davis, was released to appear before the U. S. District Court for the Southern Division of the Western District of Missouri, at Springfield, on October 7, 1912. All done this May 1, 1912, at Springfield, Greene County, Southern Division of the Western District of Missouri.

16

A. J. MARTIN, *U. S. Marshal.*

By A. L. ARNOLD, *Deputy Marshal.*

Fees: Writ, \$2.00; att., \$2.00; bond, \$.50; total, \$4.50.

I further certify that I executed this writ by taking the body of the within-named William B. Davis, whereupon the said William B. Davis presented bond in the sum of \$2,500.00, and said bond being approved by George Pepperdine, U. S. commissioner, he, the said William B. Davis was released to appear before the U. S. District court for the Southern Division of the Western District of Missouri, at Springfield, Missouri, on October 7, 1912. All done this May 23, 1912, at Springfield, Greene County, Southern Division of the Western District of Missouri.

A. J. MARTIN, *U. S. Marshal.*

By A. L. ARNOLD, *Deputy Marshal.*

Fees: Writ, \$2.00; att., \$2.00; bond, \$.50; total, \$4.50.

Be it further remembered that on the 7th day of October, A. D. 1912, proceedings were had and entry of record made as follows, to wit:

Southern Division of the Western District of Missouri.

1912, Oct. 7th.

Be it remembered, that at a stated term of the District Court of the United States for the Southern Division of the Western District of Missouri, begun and held at the city of Springfield, in said division



and district, on the 7th day of October, A. D. 1912, there were present as follows: Hon. Arba S. Van Valkenburgh, United States district judge; Hon. Leslie J. Lyons, United States district attorney; Hon. A. J. Martin, United States marshal; Hon. John B. Warner, United States district clerk.

Court opened and convened pursuant to law and adjournment and proceedings were had as follows:

And on the same day, to wit, the 7th day of October, A. D. 1912, the same being the first judicial day of said term, proceedings were had and entry of record made in said cause as follows, to wit:

Southern Division of the Western District of Missouri.

1912, Oct. 7th.

THE UNITED STATES	}	#2584. Violation sec. 37, Penal Code.
<i>vs.</i>		
JAMES A. DAVIS AND WILLIAM B. DAVIS.		

17 Now on this day the said defendants James A. Davis and

William B. Davis, each being present in open court in person and by their attorneys, to wit, Hamlin and Sewell, by leave of court first had and obtained, each file a separate demurrer to the indictment and each and every count thereof, whereupon said demurrers so filed by the defendants are at once taken up by the court for consideration, and after due consideration thereof and upon hearing the argument of counsel and being fully advised in the premises and while the said defendants are still in court it is ordered and adjudged by the court that each of said demurrers so filed by the defendants be sustained and allowed as to the first, second, and third counts of the indictment herein. And it is further ordered by the court that each of said demurrers be, and the same is hereby, overruled and disallowed as to the fourth count of said indictment, which said demurrer of the defendant William B. Davis so filed is in words and figures as follows, to wit:

In the District Court of the United States for the Southern Division  
of the Western District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF.	}	No. ——. Separate de- murrer of William B. Davis to the indictment.
<i>vs.</i>		
JOHN A. DAVIS ET AL., DEFENDANTS.		

Now at this day comes William B. Davis, one of the defendants in the above-entitled cause, and demurs to the indictment herein and to each and every count thereof, for the following reasons, to wit:

First, Because said indictment and each and every one of the four counts thereof fail to state facts sufficient to show that the said defendant William B. Davis has committed any offense against the

laws of the United States, and particularly fails to allege facts sufficient to show that he has committed the offense prohibited in and by section 37 of the Criminal Code, upon which said indictment is based.

18 Second. Because it is alleged in said indictment, and in each and every one of the four counts thereof, that defendants did conspire together to commit an offense against the United States, and the facts alleged to have been committed by defendants or which is alleged they conspired to commit do not constitute any criminal offense against the United States.

Third. Because it is alleged that defendants did conspire to commit an offense against the United States, and that the offense consisted of uttering or causing to be uttered and published as true the false, fraudulent, and untrue affidavit and assignment of Mary A. Forrester, which said affidavit and assignment are described in the first, second, and fourth counts of the indictment, and disclose on their face that they are unauthorized and are not required under and by virtue of sections 2306 and 2307 of the Revised Statutes of the United States, and the alleged conspiracy to utter and publish the alleged false affidavit and assignment as true and cause the same to be so uttered and published or to transmit or cause to be transmitted to the United States Land Office does not constitute any criminal offense against the United States.

Fourth. Because the alleged false affidavit and assignment contained in the indictment disclose on their face that they are mere ex parte declarations, unofficial in character, and initiate no right of entry, and are unknown to any law of the United States, and can not be made the basis of any criminal offense against the United States.

Fifth. Because it is alleged in the first two counts of said indictment that defendants did conspire to utter and publish and cause to be uttered and published as true the false affidavit and assignment of Mary A. Forrester, and in the third count the false affidavit of Yates, and in all of said counts the overt act is alleged to consist in assigning the alleged fraudulent right to a widow's additional homestead entry of Mary A. Forrester, and also executing a written instrument whereby they did guarantee unto Gertrude E. Platt the right of Forrester, etc., whereas it appears that the alleged overt acts in all of the counts of said indictment are not sufficient to constitute overt acts within the provision of section 37 of the Criminal Code of the United States. That said alleged overt acts are not independent of the alleged conspiracy, nor are they in furtherance or in execution of the same, but affirmatively appear to be included in the alleged conspiracy.

Sixth. Because the affidavit and assignment set forth in said indictment did not and could not under any law of the United States constitute any proof or evidence in the alleged additional homestead of the said Mary A. Forrester.

Seventh. Because said affidavit and assignment could not be made the basis of any criminal offense as charged in this indictment and in each count thereof, because there is no law of the United States prohibiting the false, fraudulent, etc., making or uttering of any such instruments or declaring the false, fraudulent, etc., making or uttering the same a criminal offense against the United States.

Eighth. Because it is not alleged in said indictment nor in any count thereof that the affidavit in the first count, the assignment in the second count, the affidavit in the third count, or the affidavit and assignment mentioned in the fourth count were not genuine in their execution, but said indictment and each count thereof fails to allege that said instruments therein named and upon which the alleged crime is based for which the alleged conspiracy was formed to commit were forged and not genuine in their execution.

Ninth. That the said indictment and each count thereof fails to allege or set forth any affidavit or instrument within the provision of section 28 or 29 of the Criminal Code of the United States or to allege the acts with reference to any such affidavits, etc., within the provision of said section and fails to allege the false making or forgery of any instruments within the provisions of said section.

Tenth. Because said indictment and each and every count thereof is vague, indefinite, and uncertain that defendant is unable to know and defend against any of the alleged charges or properly prepare for trial.

20 Eleventh. Because the first, second, and fourth counts of said indictment charges more than one alleged offense in each count thereof. That the first count charges an alleged conspiracy to commit the alleged crime by uttering, etc., the false, etc., affidavit and assignment of Mary A. Forrester, thereby alleging two distinct offenses in said count and rendering the same bad for duplicity. That the second count contains the same allegation and is bad for the same reason; that the fourth count contains the allegation that defendant did conspire to transmit, etc., to the land office, etc., the false, etc., affidavit and assignment of Mary A. Forrester, thereby charging two distinct offences and rendering said count bad for duplicity.

Twelfth. That said indictment alleges that defendants did conspire to commit an offense against the United States on or about the 1st day of June, 1909, and in the first count, second count, and third count the same conspiracy is alleged, while in the fourth count the conspiracy is alleged to be for the purpose of committing another alleged crime and therefore said indictment as a whole is bad for duplicity.

Thirteenth. Because said indictment is invalid in charging the alleged offense of conspiracy in different counts.

Fourteenth. The first count purports to set out the affidavit and assignment of Mary A. Forrester, whereas the same was not set forth in said court. The second count purports to set forth the alleged

affidavit of Mary A. Forrester, whereas the same is not contained therein. The fourth count purports to set forth the alleged assignment of Mary A. Forrester, which is not contained therein. Therefore, defendant says that said counts upon their face are incomplete and discloses a variance in their allegations.

Fifteenth. Because it appears from the alleged affidavits and assignment in the indictment that they were executed more than three years before the finding of the indictment herein and that the alleged conspiracy and alleged overt act or acts in pursuance thereof occurred more than three years before the finding of said indictment and defendant was not at any time nor has he ever been a fugitive from justice.

21 Sixteenth. That the alleged false affidavit of Yates in the third count of said indictment discloses on its face that it is not authorized under sections 2306 and 2307, Revised Statutes of the United States, and that it is ex parte, unofficial, and not included in sections 28 and 29 of the Criminal Code, and is therefore of no legal value, force, or effect, and cannot be made the basis of any criminal offense.

Seventeenth. That it appears affirmatively in the fourth count of said indictment that the alleged false affidavit and assignment therein were not to be transmitted by defendant, or either of them, to the land office of the United States, and therefore no criminal offense was therein charged. That said affidavit and assignment could not be transmitted and presented at the land office of the United States with the alleged intent to defraud United States because they constitute no evidence, proof, and are unofficial in character and could not in any manner defraud United States.

Eighteenth. That the alleged false instruments in the indictment and in each count thereof are without legal effect so far as the United States is concerned, and defendants could not conspire to commit the alleged crime where one ingredient of said crime is the intent to defraud United States, when as a matter of fact and law said instrument could not be the basis of said alleged crime and could in no manner defraud the United States, and therefore their use by defendant could not be with an intention to defraud.

Wherefore for each and all of the above specified reasons and for other good causes of demurrer appearing on the face of said indictment and the various counts thereof, the defendant William B. Davis doth demur thereto and to the respective counts therein, and prays the court to adjudge the said indictment and each count thereof insufficient in law to require the defendant William B. Davis to plead thereto, and to quash, set aside, and hold for naught the said indictment and each count thereof.

HAMLIN AND SEWELL,

*Att's for Defendant.*

22 (Indorsed:) Filed October 7th, 1912. John B. Warner, clerk, by George Pepperdine, deputy.

And which said demurrer of John A. Davis so filed is in words and figures as follows, to wit:

In the District Court of the United States for the Southern Division of the Western District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,	} No. —. Separate demurrer of John A. Davis to the indictment.
<i>vs.</i>	
JOHN A. DAVIS ET AL., DEFENDANTS.	

Now at this day comes John A. Davis, one of the defendants in the above entitled cause, and demurs to the indictment herein and to each and every count thereof, for the following reasons, to wit:

First. Because said indictment and each and every one of the four counts thereof, fail to state facts sufficient to show that the said defendant John A. Davis has committed any offense against the laws of the United States, and particularly fails to allege facts sufficient to show that he has committed the offenses prohibited in and by section 37 of the Criminal Code upon which said indictment is based.

Second. Because it is alleged in said indictment and in each and every one of the four counts thereof, that defendants did conspire together to commit an offense against the United States and the facts alleged to have been committed by defendants on which it is alleged they conspired to commit, do not constitute any criminal offense against the United States.

Third. Because it is alleged that defendants did conspire to commit an offense against the United States and that the offense consisted of uttering or causing to be uttered and published as true the false, fraudulent, and untrue affidavit and assignment of Mary A. Forrester, which said affidavit and assignment are described in the first, second, and fourth counts of the indictment and discloses  
 23 on their faces that they are unauthorized and are not required under and by virtue of sections 2306 and 2307 of the Revised Statutes of the United States and the alleged conspiracy to utter and publish the alleged false affidavit and assignment as true and cause the same to be so uttered and published or to transmit or cause to be transmitted to the United States land office does not constitute any criminal offense against the United States.

Fourth. Because the alleged false affidavit and assignment contained in the indictment discloses on their face that they are mere ex parte declarations, unofficial in character, and initiate no right of entry and are unknown to any law of the United States, and can not be made the basis of any criminal offense against the United States.

Fifth. Because it is alleged in the first two counts of said indictment that defendants did conspire to utter and publish and cause to be uttered and published as true the false affidavit and assignment of Mary A. Forrester, and in the third count the false, etc., affidavit of Yates, and in all of said counts the overt act is alleged

to consist in assigning the alleged fraudulent right to a widow's additional homestead entry of Mary A. Forrester, and the false, etc., affidavit and assignment of the said Mary A. Forrester, and also executing a written instrument whereby they did guarantee unto Gertrude E. Platt, the right of Forrester, etc., whereas it appears that the alleged overt acts in all of the counts of said indictment are not sufficient to constitute overt acts within the provision of section 37 of the Criminal Code of the United States. That said alleged overt acts are not independent of the alleged conspiracy, nor are they in furtherance or in execution of the same, but affirmatively appear to be included in the alleged conspiracy.

Sixth. Because the affidavits and assignment set forth in said indictment did not and could not under any law of the United States constitute any proof or evidence in the alleged additional homestead of the said Mary A. Forrester.

Seventh. Because said affidavit and assignment could not be made the basis of any criminal offense as charged in this indictment and in each count thereof because there is no law of the United States prohibiting the false, fraudulent, etc., making or uttering of any of such instruments declaring the false, fraudulent, etc., making or uttering the same a criminal offense against the United States.

Eighth. Because it is not alleged in said indictment nor in any count thereof that the affidavit in the first count, the assignment in the second count, the affidavit in the third count, or the affidavit and assignment mentioned in the fourth count were not genuine in their execution, but said indictment and each count thereof fails to allege that said instruments therein named and upon which the alleged crime is based for which the alleged conspiracy was formed to commit were forged and not genuine in their execution.

Ninth. That the said indictment and each count thereof fails to allege or set forth any affidavit or instrument within the provision of sections 28 or 29 of the Criminal Code of the United States or to allege the acts with reference to any such affidavits, etc., within the provision of said section and fails to allege the false making or forgery of any instruments within the provisions of said sections.

Tenth. Because said indictment and each and every count thereof is so vague, indefinite, and uncertain that defendant is unable to know and defend against any of the alleged charges or properly prepare for trial.

Eleventh. Because the first, second, and fourth counts of said indictment charges more than one alleged offense in each count thereof. That the first count charges an alleged conspiracy to commit the alleged crime by uttering, etc., the false, etc., affidavit and assignment of Mary A. Forrester, thereby alleging two distinct offenses in said count and rendering the same bad for duplicity. That the second count contains the same allegation and is bad for the same reason; that the fourth count contains the allegation that defendant did conspire to transmit, etc., to the land office, etc., the false, etc., affidavit

and assignment of Mary A. Forrester, thereby charging two distinct offenses and rendering said count bad for duplicity.

Twelve. That said indictment alleged that defendants did conspire to commit an offense against the United States on or about the

1st day of June, 1909, and in the first count, second count, and  
25 third count the same conspiracy is alleged, while in the fourth count the conspiracy is alleged to be for the purpose of committing another alleged crime, and therefore said indictment as a whole is bad for duplicity.

Thirteenth. Because said indictment is invalid in charging the alleged offense of conspiracy in different counts.

Fourteenth. The first count purports to set out the affidavit and assignment of Mary A. Forrester, whereas the same was not set forth in said count. The second count purports to set forth the alleged affidavit of Mary A. Forrester, whereas the same is not contained therein. The fourth count purports to set forth the alleged assignment of Mary A. Forrester, which is not contained therein. Therefore defendant says that said counts upon their face are incomplete and discloses a variance in their allegations.

Fifteenth. Because it appears from the alleged affidavits and assignment in the indictment that they were executed more than three years before the finding of the indictment herein and that the alleged conspiracy and alleged overt act or acts in pursuance thereof occurred more than three years before the finding of said indictment and defendant was not at any time nor has he ever been a fugitive from justice.

Sixteenth. That the alleged false affidavit of Yates in the third count of said indictment discloses on its face that it is not authorized under sections 2306 and 2307, Revised Statutes of the United States, and that it is ex parte, unofficial, and not included in sections 28 and 29 of the Criminal Court, and is therefore of no legal value, force, or effect, and can not be made the basis of any criminal offense.

Seventeenth. That it appears affirmatively in the fourth count of said indictment that the alleged false affidavit and assignment therein were not to be transmitted by defendant or either of them to the Land Office of the United States and therefore no criminal offense was therein charged. That said affidavit and assignment could not be so transmitted and presented at the land office of the United

26 States with the alleged intent to defraud United States because they constitute no evidence, proof, and are unofficial in character and could not in any manner defraud the United States.

Eighteen. That the alleged false instruments in the indictment and in each count thereof are without legal effect so far as the United States is concerned and defendants could not conspire to commit the alleged crime where one ingredient of said crime is the intent to defraud United States, when as a matter of fact and law said instrument could not be the basis of said alleged crime and could in no

manner defraud the United States, and therefore their use by defendant could not be with an intention to defraud.

Wherefore, for each and all of the above-specified reasons and for other good causes of demurrer appearing on the face of said indictment and the various counts thereof, the defendant John A. Davis doth demur thereto and to the respective counts therein, and prays the court to adjudge the said indictment, and each count thereof, insufficient in law to require the defendant John A. Davis to plead thereto, and to quash, set aside, and hold for naught the said indictment and each count thereof.

HAMLIN & SEWELL,

*Attys. for Deft.*

Indorsed: Filed October 7th, 1912. John B. Warner, clerk, by George Pepperdine, deputy.

And afterwards, to wit, on the 8th day of October, A. D. 1912, and during the session of said district court, and on the second judicial day of said October term, proceedings were had and entry of record made in said cause as follows, to wit:

Southern Division of the Western District of Missouri.

Oct. 8, 1912.

THE UNITED STATES	}	#2584. Violation section 37, Penal Code.
<i>vs.</i>		
JOHN A. DAVIS AND WILLIAM B. DAVIS,		

And now on this day come the parties hereto, the United States by Leslie J. Lyons, the United States district attorney, and the defendants, John A. Davis and William B. Davis, are each present in court in person and each is represented by his counsel, Hamlin and Sewell, who are present, and now the court doth of its own motion set aside its ruling and action on yesterday, October 7, 1912, wherein the court did sustain a demurrer on the part of each defendant to the

27 first, second, and third counts of the indictment in this cause, and did overrule and deny said demurrers as to the fourth count of said indictment. And now after setting aside its ruling and finding as aforesaid the court doth take up the separate demurrers of said defendants to the indictment for consideration again, and said defendants still being present as aforesaid, and after hearing the argument of counsel on either side and being fully advised in the premises, the court doth order, direct, and adjudge that said demurrers and each of them so filed by said defendants be, and the same, and each of them, is hereby sustained and allowed to each and every count of the said indictment. To which ruling and action of the court in sustaining and allowing said demurrers as aforesaid and



each of them the United States, at the time, by the honorable district attorney, duly excepts.

THE UNITED STATES	}	Violation section 37, Penal Code.
<i>vs.</i>		
JOHN A. DAVIS AND WILLIAM B. DAVIS.		

And now come the said defendants, John A. Davis and William B. Davis, and each acknowledges himself to owe and be indebted to the United States of America in the penal sum of five hundred dollars, to be levied of his goods and chattels, lands and tenements, to be void, however, upon condition that he be present to answer any indictment that may be returned against him in this court and be present to obey any order or direction that may be placed upon him with reference to the said present indictment by any court to which this cause may be appealed. Otherwise to remain in full force and effect.

And afterwards, to wit, on November 2nd, A. D. 1912, there was filed in said court by the Government through hon. United States district attorney a petition for a writ of error, which said petition is in words and figures as follows, to wit:

In the District Court of the United States for the Southern Division of the Western District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS, DEFENDANTS.

28

*Petition for writ of error.*

Comes now the above named plaintiff, United States of America, by Leslie J. Lyons, esquire, its attorney for the Western District of Missouri, and complains that in the record and proceedings had in said cause, and also in the rendition of the decision and judgment in the above entitled cause in said United States District Court for the Southern Division of the Western District of Missouri, at the October term, 1912, thereof, against said plaintiff on the 8th day of October, 1912, manifest error hath happened to the great damage of said plaintiff in the decision and judgment of said District Court in sustaining the demurrers to the indictment therein, and all the counts thereof, which said decision and judgment is based upon the construction of the statute upon which said indictment is founded, to wit, sections 28, 29, and 37 of the act of Congress approved February 4, 1887, entitled "An act to codify, revise, and amend the penal laws of the United States."

Wherefore this plaintiff prays for the allowance of a writ of error in said cause, and for such other orders and process as may cause the errors here complained of to be corrected, and the judgment and

decision in said cause to be reversed by the Supreme Court of the United States of America.

Dated this 2nd day of November, 1912.

LESLIE J. LYONS,

*United States Attorney, Western District  
of Missouri, Attorney for Plaintiff.*

(Indorsed:) Filed Nov. 2, 1912. John B. Warner, clerk, by  
George Pepperdine, deputy.

And on the same day, to wit, November 2nd, A. D. 1912, the United States through hon. district attorney filed an assignment of errors, which said assignment of errors is in words and figures as follows, to wit:

In the District Court of the United States for the Southern Division  
of the Western District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS, DEFENDANTS. }

29

*Assignment of errors.*

Comes now the United States of America, plaintiff herein, by Leslie J. Lyons, United States attorney for the Western District of Missouri, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That the court erred in sustaining the demurrers filed by the defendants herein to the indictment in said cause, and each and every count thereof, and by holding and deciding that said indictment, and each and every count thereof, failed to state facts sufficient to constitute any crime or offense under the provisions of sections 28, 29, and 37 of the acts of Congress approved March 4, 1909, or either of said sections, as in each of said counts alleged and charged.

2. That the court erred in sustaining the demurrers to the indictment in said cause, and each and every count thereof, and by holding and deciding that no facts are alleged, charged, or stated in any of the counts thereof that comes within or are covered by the provisions and terms of sections 28, 29, and 37 of said act of Congress approved March 4, 1909, or either of said sections, as therein alleged and charged.

3. That the court erred in its construction of said sections of said act of Congress approved March 4, 1909, by its decision and judgment in sustaining said demurrers.

4. That the court erred in sustaining and not overruling said demurrers.

5. That the court erred in deciding said demurrers against the plaintiff and in favor of the defendants.

6. That the court erred in holding and deciding that the provisions of sections 28 and 29 of said act relate and refer only to forged and counterfeited instruments, public records, affidavits, and other writings of the kind and character therein enumerated and described, and that the provisions of said sections do not relate to and cover instruments, affidavits, and other writings of the kind and character set out, alleged, and charged in said indictment, which contain false and fraudulent statements of facts as distinguished from forged instruments and writings.

30 7. That the court erred in its decision and judgment sustaining the demurrers to said indictment, and to each of the counts thereof, by holding and deciding that a charge of conspiracy under section 37 of the act of Congress approved March 4, 1909, for a violation of sections 28 and 29 of said act of March 4, 1909, as charged, alleged and stated in said indictment, and each of the counts thereof, would not lie.

8. That the court erred in holding that the defendants could not conspire together to commit the offense against the United States of unlawfully, wilfully, knowingly, and feloniously uttering and passing as true, and causing to be uttered and published as true, knowing the same to be false and untrue, with the unlawful intent to defraud the United States, the false, fraudulent and untrue affidavits, assignments and other writings set forth in said indictment, and each of the counts thereof, as therein charged, alleged and stated.

9. That the court erred in holding and deciding that the defendants could not conspire, confederate and agree together to commit the offense against the United States of unlawfully, wilfully, knowingly and feloniously transmitting to and presenting at, and causing and procuring to be transmitted to and presented at the land office of the United States of America at Roswell, New Mexico, the false, fraudulent and untrue affidavits and assignments of Mary A. Forrester, with the intent of defrauding the United States, as charged, alleged and set forth in said indictment.

10. That the court erred in holding and deciding that the false affidavits and assignments set forth in the indictment, disclose on their face that they are mere ex parte declarations, unofficial in character, and initiate no right of entry, and are unknown to any law of the United States, and cannot therefore be made the basis of a criminal offense against the United States.

11. That the court erred in holding and deciding that the overt acts charged in said indictment, and each of the counts thereof, were not sufficient to constitute overt acts within the provisions of section 37 of the act of Congress approved March 4, 1909.

12. That the court erred in holding and deciding that the overt acts set forth in said indictment, and each of the counts  
31 thereof, were not independent of the alleged conspiracy, and were not in furtherance or in execution of the same, and in holding that it affirmatively appears on the face of the indictment

that said overt acts are included in the alleged conspiracy and are a part thereof.

13. That the court erred in holding and deciding that the affidavits and assignments set forth in said indictment, and each of the counts thereof, did not and could not under the laws of the United States constitute proof or evidence of the additional homestead of the said Mary A. Forrester, as in said indictment alleged and set forth.

14. That the court erred in holding and deciding that the affidavits and assignments set forth in said indictment and each of the counts thereof, could not be made the basis of any criminal offense as charged in said indictment, and each of the counts thereof, and by holding and deciding that there is no law of the United States prohibiting the false and fraudulent making and uttering of said instruments, and no law declaring the uttering and prohibiting of false and fraudulent affidavits and assignments a criminal offense against the United States.

Wherefore, the United States of America prays that the decision and judgment of said District Court of the United States for the Southern Division of the Western District of Missouri may be reversed, annulled, and held for naught, and that the said United States of America may be restored to all things which it has lost by occasion of said judgment.

LESLIE J. LYONS,  
United States Attorney,  
Western District of Missouri,  
Counsel for Plaintiff.

SPRINGFIELD, MISSOURI, November 2, 1912.

(Indorsed:) Filed Nov. 2, 1912. John B. Warner, clerk, by George Pepperdine, deputy.

And on the same day, to wit, November 2nd, A. D. 1912, an order of court was made, filed and entered allowing said writ of error, which said order is in words and figures as follows, to wit:

32 In the District Court of the United States for the Southern Division of the Western District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
JOHN A. DAVIS AND WILLIAM B. DAVIS, DEFENDANTS.	}

*Order allowing writ of error.*

Upon motion of Leslie J. Lyons, Esquire, attorney for the Western District of Missouri, and attorney for the United States of America, plaintiff in error, and on filing petition for an order allowing writ of errors, together with an assignment of errors.

It is ordered that a writ of error be allowed to the Supreme Court of the United States from the decision and judgment entered October

8, 1912, sustaining the demurrers filed by the defendants herein to the indictment, and each and every count thereof, in the above entitled cause, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

ARBA S. VANVALKENBURGH,  
*Judge, United States District Court,*  
*Western District of Missouri.*

Dated, Springfield, Missouri, November 2, 1912.

which said order allowing writ of error is indorsed: Filed Nov. 2, 1912. John B. Warner, clerk, by George Pepperdine, deputy.

33 And afterwards, to wit, on November 22, 1912, entry of record appears as follows:

THE UNITED STATES	}	No. 2584.
<i>vs.</i>		
JOHN A. DAVIS AND WILLIAM B. DAVIS.		

Now on this day a writ of error is issued and filed in this cause as per order of court.

Which said writ of error is in words and figures as follows, to wit:

In the District Court of the United States for the Southern Division  
of the Western District of Missouri.

UNITED STATES OF AMERICA	}
<i>vs.</i>	
JOHN A. DAVIS AND WILLIAM B. DAVIS.	

WRIT OF ERROR.

*The President of the United States, to the judge of the District Court of the United States, for the Southern Division of the Western District of Missouri, greeting:*

Because in the record and proceedings and also in the rendition of the judgment of a demurrer which is in said district court before you between the United States of America and John A. Davis and William B. Davis, a manifest error hath happened to the great damage of the said the United States of America, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have the same at Washington, D. C., on the 21st day of December next, in the said Supreme Court to be then

26 UNITED STATES VS. JOHN A. DAVIS AND WILLIAM B. DAVIS.

and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States should be done.

34 Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the district court.

Issued at office in Springfield, this 22nd day of November, A. D. 1912.

[SEAL.]

JOHN B. WARNER, *Clerk*,

By GEORGE PEPPERDINE, *Deputy Clerk*,

*United States District Court for the Southern Division, Western District of Missouri.*

Allowed by—

ARBA S. VANVALKENBURGH, *Judge*.

SOUTHERN DIVISION, WESTERN DISTRICT OF MISSOURI, *set.:*

I do hereby return due and perfect obedience to the within writ and do herewith, under the seal of said district court, distinctly and openly send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk, and the seal of said court.

Issued at office in Springfield, Missouri, this 2nd day of December, A. D. 1912.

[SEAL.]

JOHN B. WARNER, *Clerk*,

By GEORGE PEPPERDINE, *Deputy Clerk*,

*Southern Division, Western District of Missouri.*

(Indorsed:) Filed November 22, 1912. John B. Warner, clerk, by George Pepperdine, deputy.

And on the same date, to wit: November 22, 1912, citation is issued, served, and filed, which citation is in words as follows:

In the District Court of the United States for the Southern Division of the Western District of Missouri.

UNITED STATES OF AMERICA

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS. }

35

*Citation.*

UNITED STATES OF AMERICA, *set.:*

*To John A. Davis and William B. Davis, greeting:*

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the 21st day of December next, pursuant to a writ of error filed in the clerk's office of the District Court of the

United States for the Southern Division of the Western District of Missouri, wherein the United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Arba S. VanValkenburgh, judge of the District Court of the United States for the Western District of Missouri, this 22nd day of November, in the year of our Lord one thousand nine hundred and twelve.

ARBA S. VANVALKENBURGH, *Judge.*

UNITED STATES OF AMERICA,

*Western District of Missouri, ss.:*

We hereby acknowledge due service of the within citation this 22nd day of November, A. D. 1912.

O. T. HAMLIN,

T. M. SEAWELL,

*Attorneys for Defendants in Error.*

(Indorsed:) Filed November 22nd, 1912. John B. Warner, clerk, by George Pepperdine, deputy.

36 In the District Court of the United States for the Southern Division of the Western District of Missouri.

UNITED STATES OF AMERICA

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *set.:*

*The President of the United States, to the judge of the District Court of the United States for the Southern Division of the Western District of Missouri, greeting:*

Because in the record and proceedings and also in the rendition of the judgment of a demurrer which is in said district court before you between the United States of America and John A. Davis and William B. Davis a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the 21st day of December next, in the said Supreme Court to be then and there held,

28 UNITED STATES VS. JOHN A. DAVIS AND WILLIAM B. DAVIS.

that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right according to the laws and customs of the United States should be done.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the District Court.

Issued at office in Springfield, this 22nd day of November, A. D. 1912.

JOHN B. WARNER, *Clerk*,

By GEORGE PEPPERDINE, *Deputy Clerk*,  
*United States District Court for the  
Southern Division, Western District of Missouri.*

Allowed by—

ARBA S. VAN VALKENBURGH, *Judge*.

36½ SOUTHERN DIVISION, WESTERN DISTRICT OF MISSOURI, *set.:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of the said District Court, distinctly and openly send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court.

Issued at office in Springfield, Missouri, this second day of December, A. D. 1912.

[SEAL.]

JOHN B. WARNER, *Clerk*,

By GEORGE PEPPERDINE, *Deputy Clerk*,  
*Southern Division, Western District of Missouri.*

36¾ (Indorsed:) No. 2584. United States District Court, Southern Division of the Western District of Missouri. United States of America vs. John A. Davis and William B. Davis. Writ of error. Filed November 22, 1912. John B. Warner, clerk; by George Pepperdine, deputy.

37 In the District Court of the United States for the Southern Division of the Western District of Missouri.

UNITED STATES OF AMERICA

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS.

*Citation.*

UNITED STATES OF AMERICA, *set.:*

*To John A. Davis and William B. Davis, greeting:*

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the 21st day of December next, pursuant to a writ of error filed in the clerk's office of the District Court of the



United States for the Southern Division of the Western District of Missouri, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Arba S. Van Valkenburgh, judge of the District Court of the United States for the Western District of Missouri, this 22nd day of November, in the year of our Lord one thousand nine hundred and twelve.

ARBA S. VAN VALKENBURGH, *Judge.*

UNITED STATES OF AMERICA,

*Western District of Missouri, ss.:*

We hereby acknowledge due service of the within citation this 22nd day of November, A. D. 1912.

O. T. HAMLIN,

T. M. SEAWELL,

*Attorneys for Defendants in Error.*

37½ (Indorsed:) No. 2584. United States District Court, Southern Division of the Western District of Missouri. United States of America vs. John A. Davis and William B. Davis. Citation. Filed November 22, 1912. John B. Warner, clerk; by George Pepperdine, deputy.

38 UNITED STATES OF AMERICA,

*Western District of Missouri, set.:*

I, John B. Warner, clerk of the District Court of the United States for the Southern Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record and proceedings with all things concerning the same in case #2584, The United States of America against John A. Davis and William B. Davis, as full as the originals on file and of record in my office.

I further certify that the original citation and writ of error are hereto attached and herewith returned.

In witness whereof I hereunto subscribe my name and affix the seal of the said District Court of the United States for the Southern Division of the Western District of Missouri this second day of December, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

JOHN B. WARNER, *Clerk of said Court.*  
By GEORGE PEPPERDINE, *Deputy.*

(Indorsement on error:) File No. 23453. W. Missouri D. C. U. S. Term No. 878. The United States, plaintiff in error, vs. John A. Davis and William B. Davis. Filed December 11th, 1912. File No. 23453.

1 In the District Court of the United States for the Southern  
Division of the Western District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

JOHN A. DAVIS AND WILLIAM B. DAVIS, DEFENDANTS.

The separate demurrers filed by each of the defendants in the above-entitled cause to the indictment therein, and each and every count thereof, were sustained upon the ground and for the reason that the facts alleged in the indictment would not constitute any offense under sections 28 and 29 of the penal code, namely, the act of Congress approved March 4, 1909, for the reason that said sections relate and refer to forged, false, and counterfeited instruments, public records, affidavits, and other writings, and not to instruments, public records, affidavits, and other writings containing false statements, and therefore the indictment does not state facts sufficient to constitute an offense under section 37 of the said penal code, namely, a conspiracy to commit an offense prohibited by said sections 28 and 29 of said penal code.

It is ordered that the above shall be filed and made a part of the record in said cause and that a certified copy hereof shall be forwarded by the clerk of this court to the clerk of the Supreme Court.

Dated this 22nd day of March, 1913.

(Signed)

ARBA S. VAN VALKENBURGH,

*Judge.*

2 UNITED STATES OF AMERICA,

*Southern Division, Western District of Missouri:*

I, John B. Warner, clerk of the District Court of the United States for the Southern Division of the Western District of Missouri, certify that the above and foregoing is a full, true, and correct copy of the original order entered of record in the cause named.

Witness my hand and the seal of said court at Springfield, Missouri, this 24th day of March, A. D. 1913.

[SEAL.]

JOHN B. WARNER, *Clerk.*

By GEORGE PEPPERDINE, *Deputy Clerk.*

3 (Endorsed:) File No. 23453. Supreme Court, U. S. October term, 1912. Term No. 878. The United States, plff. in error, vs. John A. Davis et al. Certified copy of order of U. S. district court. Filed April 8, 1913.

2 UNITED STATES V. JOHN A. AND WILLIAM B. DAVIS.

4 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

*v.*  
JOHN A. AND WILLIAM B. DAVIS, DEFENDANTS | No. 395.  
in error. | October term, 1913.

*Stipulation.*

It is hereby stipulated that the opinion and order of the district court, entered in this cause on the 22nd day of March, 1913, a certified copy of which has been filed with the clerk of the Supreme Court of the United States, may be printed as a part of the transcript of the record in said cause.

J. C. McREYNOLDS,  
*Attorney General.*

LESLIE J. LYONS,  
*U. S. Attorney for the Western District of Missouri.*

OSCAR T. HAMLIN and THOMAS M. SEAWELL,  
*Attorneys for Defendants in Error.*

AUG. 9, 1913.

5 (Endorsed:) File No. 23453, Supreme Court, U. S. October term, 1913. Term No. 395. The United States, plff. in error, vs. John A. Davis et al. Stipulation that certified copy of order of U. S. district court be printed as part of the transcript of record. Filed Aug. 28th, 1913.

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12  
Office Supreme Court, U. S.  
FILED.

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JAMES H. MCKENNEY,

No. ~~878~~. 395

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, *Plaintiff in Error.*

v.

JOHN A. DAVIS AND WILLIAM B. DAVIS,  
*Defendants in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF MISSOURI.

**MOTION BY THE UNITED STATES TO ADVANCE.**

The Solicitor General, on behalf of the United States, moves that this case be advanced for early hearing, since it is here under the Criminal Appeals Act; and that it be placed on the *summary docket*, since the question involved is simple.

The defendants were indicted for engaging in an unlawful conspiracy in violation of section 37 of the Criminal Code. The conspiracy was to commit violations of sections 28 and 29, which prohibit the uttering or publishing or the transmission to any office of the Government of false, forged, altered, or

counterfeited bonds, deeds, powers of attorney, affidavits, and other writings for the purpose of defrauding the United States. The papers which the defendants uttered and published as true and transmitted for the purpose of defrauding the United States were certain falsely verified affidavits and assignments, procured from the alleged widow of a soldier who had made a homestead entry, and purporting to assign the entry rights. Demurrers were entered and sustained on the ground that sections 28 and 29 do not apply to documents and writings which are simply falsely sworn to, but apply only to such as are forged or counterfeited; and this shows the question involved here.

Notice of this motion has been given opposing counsel.

WM. MARSHALL BULLITT,  
*Solicitor General.*

FEBRUARY 3, 1913.

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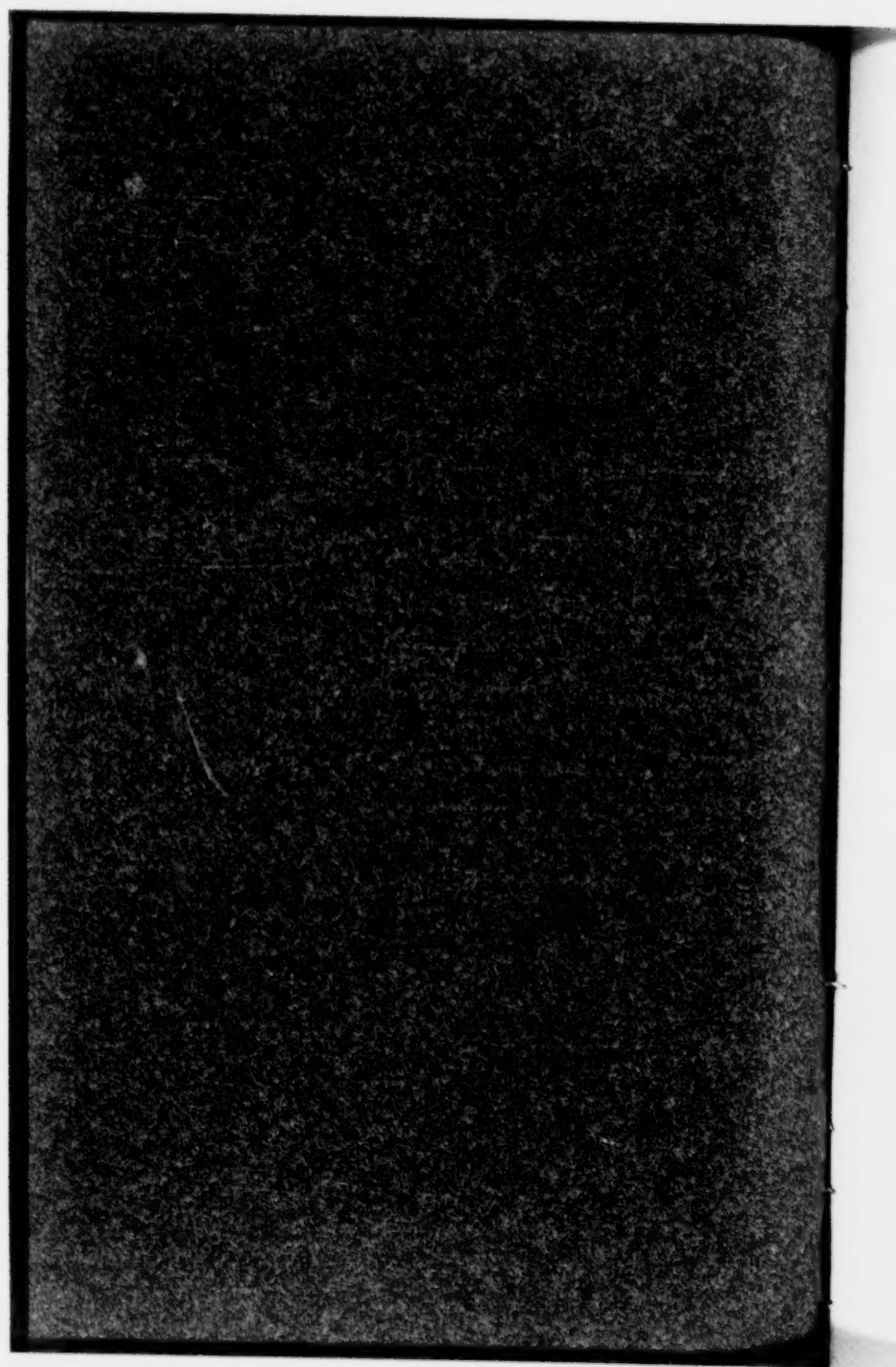
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# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

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THE UNITED STATES, plaintiff in error,	} No. 395.
v.	
JOHN A. DAVIS AND WILLIAM B. DAVIS.	

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF MISSOURI.*

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT.

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This case is brought here under the criminal appeals act, to review a decision based upon what is believed to be an erroneous construction of the third clause of section 5421 of the Revised Statutes. Defendants were charged, under section 5440 of the Revised Statutes (Penal Code, sec. 37), with conspiring to commit certain specific offenses in the use of false and fraudulent (not forged) documents, in support of a fraudulent claim for land under the law granting homesteads to honorably discharged soldiers and sailors of the Civil War. (R. S., secs. 2304-2307.) By section 2306, a beneficiary who



has already made entry of less than 160 acres may take an additional entry to make up the deficiency. By section 2307, the right to make such an additional entry accrues to the widow of the beneficiary. This right is assignable (*Webster v. Luther*, 163 U. S., 331); and by regulations in force at the time of the acts mentioned in the indictment it was, among other things, provided that:

An assignee of an uncertified right desiring to make an additional entry under this section must present his application as the assignee of the soldier for a specific tract of land to the register and receiver at the local office in whose jurisdiction the land lies, accompanying the same by a complete assignment duly executed, attested, and acknowledged as prescribed respecting the assignment of bounty-land warrants. The identity of the original assignor with the soldier and original entryman must be established by the affidavits of two witnesses, preferably by such as have personal knowledge of the facts, or, if such witnesses can not be procured, a satisfactory reason must be given and other facts presented tending to establish such identity.

(See general circular, General Land Office, Jan. 25, 1904, pp. 26-29.)

The first count of the indictment alleges a conspiracy to utter and publish as true and to cause to be so uttered and published, with intent to defraud the United States, a certain false and fraudulent affidavit of one Mary A. Forrester, in which it is

stated *inter alia* that she is the widow of one "Michael Forester," a deceased soldier who, in January, 1872, had made a certain specified entry of 80 acres of described land, and in which the affiant makes other averments of fact tending to establish her assignable right, as such widow, to make an additional entry, adding that this right has been assigned by her to "W. B. Davis, his heirs and assigns, in accordance with an assignment hereto attached." After setting out this affidavit, the indictment charges that it is false and fraudulent in this, that the original entry was not made by the affiant's husband, but by another and different person, named "Michael Foerstel," and that the affidavit was to be used, falsely and fraudulently, to establish an additional right (based on that original entry) in Mary Forrester, the affiant. Appropriate averments occur, showing the scienter of the defendants.

The second count sets out an assignment by Mary A. Forrester to William B. Davis, his heirs and assigns, of her right to make entry of 80 acres in addition to her husband's original entry of described lands of the same amount (the lands really entered by Michael "Foerstel"). In other respects the second count is similar to the first. It states a conspiracy to cause the assignment to be "uttered and published as true," with intent to defraud the United States.

The third count is similar to the first and second, the false document described being an affidavit by one Alfred F. Yates, tending to show the identity of

Michael Foerstel, who made the original entry, and Michael Forester, in the name of whose widow the additional right was to be claimed.

The fourth and last count again relies on the affidavit of Mary A. Forrester which is relied on in the first, but is sharply distinguished from that and the second and third counts in this, that it charges a conspiracy, not to "utter and publish as true," but a conspiracy "to cause and procure" the false document "to be transmitted to and presented at the land office of the United States of America, at Roswell, N. Mex., the same being an office of the United States." This count, also, not only alleges that the document was to be so transmitted and presented with "intent to defraud the United States" (R., 9), but adds to this the averment that the false document "was intended to be used and was used *in support of and in relation to the claim of one Gertrude E. Platt, and her assigns, to enter upon 80 acres of land belonging to the United States of America, and subject to homestead entry, and to receive from the United States a patent to the land entered*" (R., 10).

By the averments of overt acts it is shown that Gertrude E. Platt became the assignee of Davis, the assignee of the widow.

The demurrers (R., 13-20) specified many objections voluminously. They were at first sustained as to the first three counts and overruled as to the fourth, but afterwards they were sustained generally as to all (R., 20). That this ruling depended upon construction of the statutes upon which the in-

dictment was founded appears not only from the assignment of errors (R., 22) and the accompanying petition for writ of error (R., 21), which was allowed by the judge who made the ruling (R., 25), but also by his memorandum and orders subsequently made and transmitted to this court, viz:

The separate demurrers filed by each of the defendants in the above-entitled cause to the indictment therein, and each and every count thereof, were sustained upon the ground and for the reason that the facts alleged in the indictment would not constitute any offense under sections 28 and 29 of the penal code, namely, the act of Congress approved March 4, 1909, for the reason that said sections relate and refer to forged, false, and counterfeited instruments, public records, affidavits, and other writings, and not to instruments, public records, affidavits, and other writings containing false statements, and, therefore, the indictment does not state facts sufficient to constitute an offense under section 37 of the said penal code, namely, a conspiracy to commit an offense prohibited by said sections 28 and 29 of said penal code.

It is ordered that the above shall be filed and made a part of the record in said cause, and that a certified copy hereof shall be forwarded by the clerk of this court to the clerk of the Supreme Court.

Dated this 22d day of March, 1913.

ARBA S. VAN VALKENBURGH,

*Judge.*

Sections 28 and 29 of the penal code, which became effective January 1, 1910 (see sec. 345), are, aside from certain additions not germane to the present case, almost literal reproductions of sections 5479 and 5421, respectively, of the Revised Statutes, which were in force when the offenses are alleged to have been committed—in the year 1909.

These two sections of the Revised Statutes are as follows:

SEC. 5421. Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or willingly aids or assists in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money;

or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited;

or who transmits to, or presents at, or causes or procures to be transmitted to or presented at any office or officer of the Government of the United States, *any* deed, power of attorney, order, certificate, receipt, *or other writing in*

*support of or in relation to any account or claim with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited shall be imprisoned at hard labor for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years and fined not more than one thousand dollars.*

SEC. 5479. If any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States;

or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited bond, bid, proposal, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited;

or shall transmit to, or present at, or cause (to) (or) procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for the purpose of defrauding the United States, shall be punishable by a fine of not more than one

thousand dollars, or by imprisonment at hard labor for not more than ten years, or by both such punishments.

To simplify the case, it will be conceded that the first two clauses of section 5421, and all three clauses of section 5479, relate to forged documents only; and the first three counts of the indictment, founded on the second clauses of these two sections, will therefore be laid out of the argument. This leaves the fourth count, to be sustained by the third clause of section 5421. That count alleges, and was manifestly construed by the trial court as alleging, a conspiracy to commit the offense of causing to be presented at an office of the Government a writing known by the conspirators to be "false," in support of and in relation to a "claim," with intent to defraud the United States.

The trial court's decision resulted entirely from the view that "false," in the third clause, as elsewhere in section 5421, means false in the making, or "forged," and may not be construed to embrace a document, like the affidavit set up in the fourth count, genuine as to execution but containing false and fraudulent representations of material facts.

Under the limitations of the present review, the sole matter to be determined is the meaning of this word "false."

## ARGUMENT.

The false writings intended by the third clause of section 5421, Revised Statutes, are not confined to forgeries, but include also writings genuine as to execution but false and fraudulent in substance.

This proposition is established conclusively by the authorities—

*United States v. Staats*, 8 How., 41.

*United States v. Barney*, 5 Blatchf., 294; 24 Fed. Cas., No. 14524.

*United States v. Bickford*, 4 Blatchf., 337; 24 Fed. Cas., No. 14591.

*United States v. Spaulding* (Dakota Territory), 13 N. W., 357.

*United States v. Hansee*, 79 Fed., 303.

*Dolan v. United States* (C. C. A., 8th Circuit), 133 Fed., 440, 450.

See also *United States v. Gowdy*, 37 Fed., 332.

Section 5421 represents the first section of the act of March 3, 1823, 3 Stat., 771, the title of which, "An act for the punishment of frauds committed on the Government of the United States," is in itself significant of the broad purpose which Congress had in mind in enacting it.

In *United States v. Staats*, *supra*, this court, answering questions from the Circuit Court, had occasion to consider whether an indictment charging the transmission of a false (but not forged) affidavit touching a claim for pension was sustainable under the third clause of the section. The following



quotation from the opinion will reveal the conclusion arrived at and the reasons upon which it was based:

The court are of opinion that the offense charged in the indictment comes within the statute.

The only doubt that can be raised is whether the writing transmitted or presented to the commissioner in support of the claim for a pension should not, within the meaning of the statute, be an instrument forged or counterfeited in the technical sense of the term, and not one genuine as to the execution but false as it respects the facts embodied in it.

The instruments referred to in the first part of the section, the false making or forging of which, with the intent stated, is made an offense, probably are forged instruments in a strict technical sense; and there is force, therefore, in the argument that the subsequent clause, making the transmission or presentation of deeds or other writings to an officer of the Government a similar offense, had reference to the same description of instruments.

But this is by no means a necessary conclusion upon the words of the statute. Indeed, upon this construction, it is not easy to see the materiality of the clause, because the uttering and publishing of the forged instruments mentioned in the first clause as true is made an offense, the same as the forging; and it is quite clear that the acts provided against in the subsequent clause amount to an uttering and publishing. If restrained, therefore, to forged instruments, the clause would seem to be unnecessary.

The deeds and other writings mentioned are not connected with those in the preceding paragraph, as would have been natural, and almost of course, if intended to describe similar instruments. The language is "any deed, power of attorney," etc.; not the aforesaid deed, which words must be in effect interpolated upon the construction contended for.

The clause, therefore, may well be regarded as providing for a distinct and independent offense,—one essential to the protection of the Government against fraudulent claims; and which consists in the transmission or presentation of false or counterfeit papers to any officers of the Government in support of an account or claim, with intent to defraud.

The case is within the mischief intended to be guarded against; and, also, within the words; and we think the considerations urged, founded upon the form and structure of the general provision, though plausible and calculated to excite doubts, not sufficient to take it out of them.

A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false and using it with intent to defraud, presents a case not distinguishable in principle, or in turpitude, or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it.

We shall direct, therefore, that it be certified to the court below, that the acts charged

in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the act above referred to.

The indictment in *United States v. Barney, supra*, charged the utterance of a forged bond conditioned to secure faithful compliance with certain revenue regulations. While the charge was based upon the second clause of the statute and the question for decision was whether a forged instrument not made for the purpose of obtaining money from the United States falls within the class intended by that clause, the court nevertheless found it necessary to construe the section as a whole. Judge Shipman, in an opinion evidently written without the *Staats case* before him, arrived at the same conclusion respecting the independence of the third clause from the first and second. After holding that the first punishes only the forging or altering of instruments for the purpose of obtaining money from the United States, the opinion proceeds as follows:

The first clause punishes the forging or altering of the same kind of instruments in respect of which the second clause punishes the uttering. Otherwise, the word "such" in the statute has no meaning. That it does, however, have a meaning, and was not a clerical error, or a word loosely and inaptly thrown in, is evident on inspecting the third clause of the section. In that clause the word "such" is dropped, and the transmission of "any" writing in support of, or in relation to, any claim

or account, with intent to defraud the United States, knowing the false and forged character of the writing, is made an offense. It makes no difference whether the account or claim is against the United States or in its favor and against an individual. The forged or false paper may be for the enhancement or support of a claim against the Government, or it may for the reduction or extinguishment of a claim in its favor against an individual. In either case, if the paper is transmitted with a guilty knowledge and intent, the crime is of the same grade and liable to the same penalty as an original forgery. The object of the offender might be, not to obtain money, but to avoid the payment of money—acts which, in a highly penal statute, require to be distinguished by plain and unambiguous terms. The word “such” was, therefore, dropped in the third clause of the act, because its use would carry with it the words of the first clause “for the purpose of obtaining or receiving \* \* \* from the United States \* \* \* any sum or sums of money,” and thus greatly narrow the scope of the third clause, thereby necessarily leaving unpunished a large class of offenses which might be committed by those who were indebted to the Government and who should seek to evade payment by false and forged writings. This would have excluded from the operation of the statute all offenses arising out of the transmission of false papers in support of, or in relation to, any *claims for land* or other property than money.

It may be asked—Why did not Congress provide, in this same act, against the forgery of all this latter class of instruments? It is not easy to answer this question, unless the answer is found in the fact that the transmission of false papers relating to accounts and claims, where no money was to be obtained, would be more readily detected and proved than the forgery of the same writings. But whether this query can be answered satisfactorily or not, it is clear that the crime of *forgery* is in this section confined to instruments designed to obtain money from the United States. This is virtually conceded by the fact that the indictment in the present case was not placed upon the third branch of the section. Apart, however, from all these considerations the plainest rules of construction show that the use of the word “such” in the second clause and its omission in the third was intended to make the first and second clauses operate on the same class of writings and on no others.

The decision in the *Bickford case*, *supra*, was made by Justice Nelson (who delivered the opinion in the *Staats case*) and District Judge Smalley. Defendant was charged with knowingly transmitting false papers to the Pension Office in support of applications for bounty land, the charges being based on this section as it stood in the original act. The indictment was demurred to upon the grounds (1) that the statute applied only to documents made or transmitted for the purpose of obtaining money from the United States and could not be extended to

cases in which the object was to obtain a bounty land warrant; (2) "that the papers alleged to contain false statements were not such as were enumerated in the act, but were merely false declarations and affidavits subscribed and sworn to by the signers;" and (3) that the offense charged was not an offense committed in Vermont, where the indictment was returned, but was one committed in the District of Columbia.

The report states that "the demurrer was overruled by the court, the last two points being regarded by the court as being virtually decided in the case of the *United States v. Staats* (8 How., 41)." Inasmuch as no question of venue or jurisdiction was presented in the *Staats case*, it is evident that it was the *first* two points that were ruled upon that authority in the *Bickford* decision, and that the word "last" in the above quotation must be a clerical mistake. The papers involved in the *Bickford case* were false in substance only—they were not forged papers.

*United States v. Spaulding, supra*, was decided by the Supreme Court of the Territory of Dakota. The defendant was indicted for transmitting to a United States land office a false affidavit in support of a fraudulent preemption entry. Two questions were presented by demurrer, first, whether such a writing fell within the third clause of section 5421, and, second, whether such a claim, not being a claim for money, was to be deemed among the claims to which that clause refers. Both questions were answered in

the affirmative, the decision of the former being rested expressly upon the decision in the *Staats case*.

In *United States v. Hansee, supra*, defendant was indicted for procuring a false affidavit to be presented to the Pension Office in a pension matter with intent to defraud the United States. The case was held to fall within the third clause of section 5421, the court by District Judge Brown saying:

Section 5421 is of broad application, covering false papers made or caused to be made, transmitted or presented, in support of any claim with intent to defraud the United States, knowing it to be false.

*Dolan v. United States, supra*, was a prosecution based on sections 5425 and 5427 of the Revised Statutes respecting the use of false certificates of citizenship, etc. Defendants claimed that the indictment was fatally defective because, by its averments, it appeared that the certificates were "false" in the sense of being untrue in statement and not in the sense of being forged. This objection was overruled, the court saying (p. 450):

The charge of the indictment, therefore, plainly is that the certificate is false in its recitals and not in its execution. The statute makes it a crime to be knowingly possessed of "any false, forged, antedated or counterfeit certificate of citizenship," etc. It is manifest that the term "false" can not be restricted to the meaning of "forged" without rendering the term entirely nugatory, for the statute itself employs both the terms "forged" and

“counterfeit,” in addition to the term “false.” It is the duty of the court to give some effect, if possible, to every word which the legislature employs. There is nothing in the context, or the mischief to be corrected, or the consequences entailed by giving to every word of the statute its full force, to justify the striking out of one of its terms. A certificate which is false in respect of those facts which alone would justify its issuance is as much within the mischief of the statute as a forged or counterfeit instrument. But the question raised is no longer open to controversy. It was settled by the Supreme Court of the United States in *U. S. v. Staats* (8 How. 41). That was a prosecution under the act of March 3, 1823, which is embodied in section 5421 of the Revised Statutes. It renders penal the use of any “false, forged, or counterfeit” writing in support of a claim against the Government. The indictment charged that the defendant “did cause and procure to be transmitted and presented to the Commissioner of Pensions of the said United States of America the said false and untrue affidavit or writing as a true writing, well knowing the said affidavit or writing was false and untrue.” The same contention was here urged as is now made, that the word “false” as contained in that statute was confined to a forged instrument.

The foregoing quotations answer the only question decided by the court below, and answer it so clearly and so directly that further discussion of it would be superfluous.



Before concluding, however, it may be well to refer briefly to another question which, though not presented by the record, as we understand, may possibly be urged by the opposing counsel. This is the question whether the term "claim," as used in the third clause of section 5421, includes a claim of land as well as a claim of money. According to its title, the original act was adopted for the broad purpose of punishing "frauds committed on the Government of the United States." Under the third clause of the section it is enough if the false writing is presented in support of, or in relation to, "*any account or claim,*" for the purpose of defrauding the Government. To confine the word "claim" to money claims would greatly narrow the statute and reduce *pro tanto* its efficiency to accomplish its declared purpose. Though this question was not directly considered in the *Staats case*, we think the reasoning of the court there applies here with equal force. The third clause is individualized, and its broad language, indicative of a broad purpose, is not allowed to be curtailed by the narrower language and purposes of the two clauses which precede it. This is the view adopted also by Judge Shipman in the *Barney case*, *supra*, as evidenced by the quotation which we have made from his opinion.

Besides this it was expressly held by Justice Nelson and District Judge Smalley in the *Bickford case*, *supra*, that the third clause applies to a case in which the claim is a claim for bounty land; and a

like ruling was made in *United States v. Wilcox* (4 Blatchf., 385; 28 Fed. Cas., No. 16691).

In view of the nature of a "soldier's additional" right, those cases can not be distinguished from the case at bar. (See *United States v. Lair*, 118 Fed., 98; *Barnes v. Poirier* (C. C. A., 8th Circuit), 64 Fed., 14; *Webster v. Luther*, 163 U. S., 331.)

*United States v. Fout* (123 Fed., 625), in respect of the question we are now discussing, was a prosecution precisely like the present. The case was disposed of by Judge Adams in his direction to the jury, not upon the ground that the statute did not include a soldier's additional claim, but upon the (doubtful) proposition that evidence that the defendant had made the false papers and sold them to another person was not evidence competent to charge him, under the third clause, with responsibility for having caused the subsequent presentation of the papers to the land office. The objection did not go to the indictment, and evidently the court felt satisfied that the case as stated in the indictment was a case within the third clause of section 5421.

In *United States v. Spaulding* (13 N. W., 357), it was held by the Supreme Court of Dakota Territory that the term "claim" includes a preemption claim.

*United States v. Reese* (4 Sawy., 629; 27 Fed. Cas., No. 16138) is hardly to be deemed an authority on the question now under discussion. The indictment charged the uttering and publishing as true (see S. C., 9 Wall., 13) of a forged writing, purporting to be a Mexican grant of land in California. Although the

indictment showed that the forgery was presented to the board of land commissioners, created by the act of March 3, 1851 (9 St., 631), to adjudicate private land claims in that State, and that the purpose was to defraud the United States by having the claim allowed, the opinion states that the indictment used the language of the second paragraph of the section and was supposed to cover a case embraced by its terms. The court goes on, however, to discuss, very briefly, the section as a whole, and declares, *obiter*, that it "applies only to instruments altered or forged for the purpose of obtaining moneys from the United States or their officers or agents." The court's attention evidently was not called to the *Staats case*, for it is not cited, and no effort whatever is made to explain or account for the differences between the language of the third clause and the language of the others. The case was reversed by the Supreme Court (9 Wall., 13), and (as pointed out in the *Spaulding case*, 13 N. W., at p. 362) Justice Field, who delivered the judgment in that court as well as in the circuit court, declined to express an opinion on the point involving the application of the statute to claims for land.

Respectfully submitted.

ERNEST KNAEBEL,  
*Assistant Attorney General.*

OCTOBER, 1913.

Office Supreme Court, U. S.  
FILED.

OCT 13 1913

JAMES H. MCKENNEY,  
CLERK

No. 395

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1912

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~~No. 872~~

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THE UNITED STATES,      *Plaintiff in Error,*

vs.

JOHN A. DAVIS and

WILLIAM B. DAVIS,      *Defendants in Error.*

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*In Error to the District Court of the United States for the Western  
District of Missouri.*

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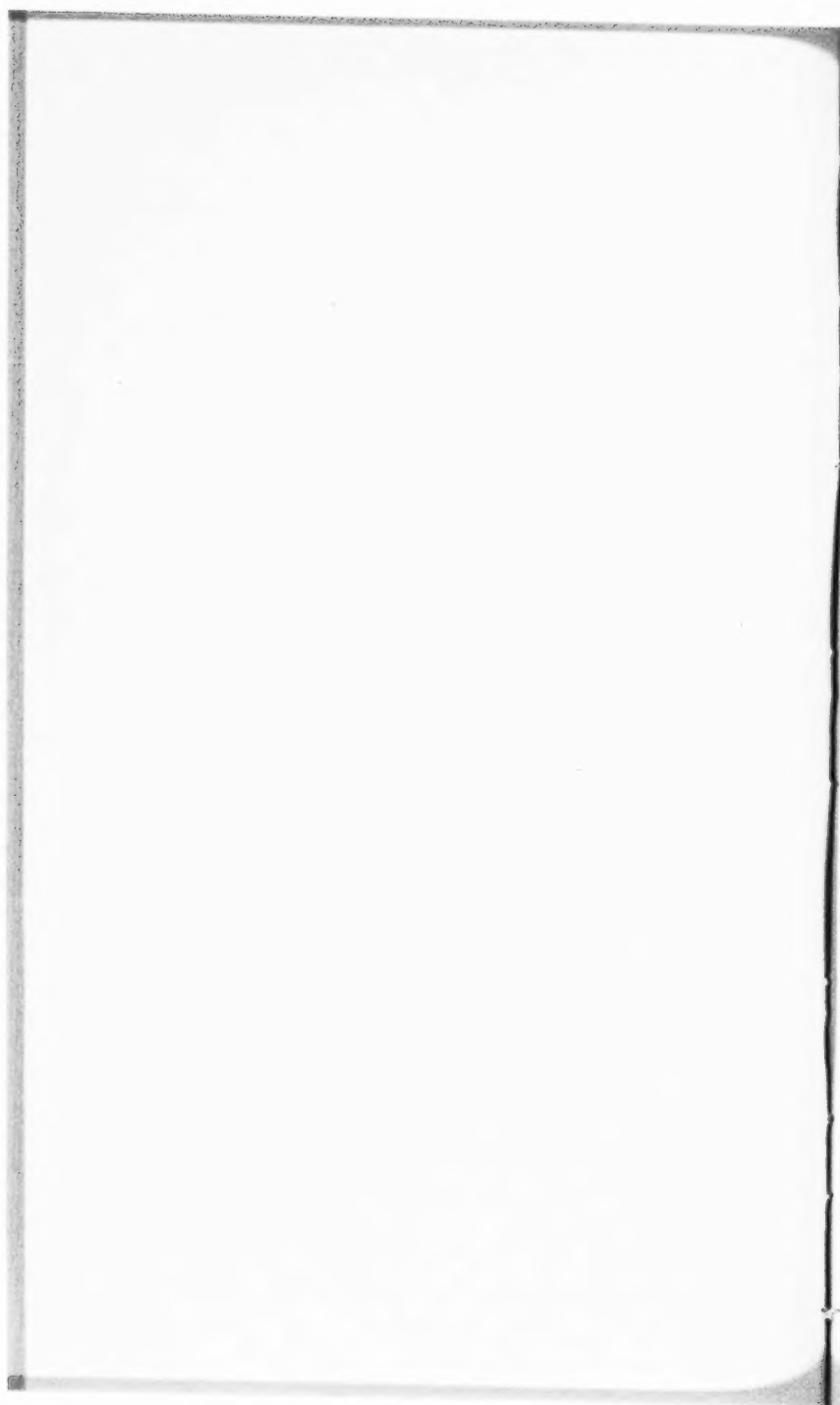
ARGUMENT AND BRIEF FOR DEFENDANTS IN ERROR.

THOMAS M. SEAWELL,

OSCAR T. HAMLIN,

*Counsel for Defendants in Error.*

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

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No. 878

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THE UNITED STATES,      *Plaintiff in Error,*

vs.

JOHN A. DAVIS and

WILLIAM B. DAVIS,      *Defendants in Error.*

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*In Error to the District Court of the United States for the Western  
District of Missouri.*

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**ARGUMENT AND BRIEF FOR DEFENDANTS IN ERROR.**

The indictment contains four counts. The first count charges in substance an alleged conspiracy to commit an offense against the United States. The offense charged consists of uttering a false, untrue, etc., affidavit and assignment purporting to be instruments executed by the widow of a soldier entitled to an additional homestead right by

virtue of Sections 2306 and 2307, Rev. Stat. of the United States. The affidavit is described therein, purporting to have been executed and acknowledged before a Notary Public and containing certain statements in regard to the additional homestead entry right. It then charges the untruthfulness of the statements contained in said affidavit and alleges the overt act by defendants to consist in the execution of a written assignment of said right and the execution of a written guaranty of its validity.

The second count is to the same effect, with the exception that the assignment therein alleged is set forth, purporting to have been executed and acknowledged before a Notary Public.

The third count bases the alleged offense upon the false, untrue, etc., affidavit therein described.

The fourth count charges a conspiracy to transmit and to cause to be transmitted to the United States Land Office at Roswell, New Mexico, said affidavit, which is set forth therein, and alleges similar overt acts by defendants as described in the other counts.

The construction of this indictment and each count thereof by the lower court was in effect that the instruments alleged to have been uttered for which the conspiracy was formed were not forged, but when all the allegations of the indictment were considered they appear to be genuine in execution and only false in their statements. This construction is without doubt correct, but if it were not, still this court cannot review that question in this proceeding because the construction of the indictment made by the lower court is final in this court.

U. S. v. Biggs, 211 U. S. 507;

U. S. v. Keitel, 211 U. S. 370.

Sections 28 and 29 of the Penal Code, namely, the Act of Congress approved March 4th, 1909, relate and refer

solely to forged, false and counterfeited instruments, public records, affidavits and other writings, and not to instruments, public records, affidavits and other writings containing false statements; therefore, the indictment does not state facts sufficient to constitute an offense under Section 57 of the said Penal Code, namely, a conspiracy to commit an offense prohibited by said Sections 28 and 29 of said Penal Code.

U. S. v. Statts, 8 Howard 41; *W.S.V. Maxwell 11 Wall 432*

U. S. v. Moore, 60 Fed. 738;

U. S. v. Glasener, 81 Fed. 566;

U. S. v. Albert, 45 Fed. 552;

U. S. v. Wentworth, 11 Fed. 52;

U. S. v. Barney, 5 Blatchf, 294;

U. S. v. Reese, 4 Sawy 629;

State v. Willson, 28 Minn. 52;

Mann v. People, 15 Hun. 155;

State v. Young, 46 N. H. 266;

Com. v. Baldwin, 11 Gray 197;

Barb Cr. Law, 97.

Whart Cr. Law, Sec. 653.

In U. S. v. Wentworth, cited ante, the court in an able opinion construing Section 28, uses the following apt language: "The indictments in this case seem to have been framed upon the idea that the **false making** mentioned in the Statute was in the nature of perjury, because, after reciting the affidavit, they go on to allege in what particulars they are false. But we are satisfied that is not the true construction of the Statute. A little analysis and attention to its language makes this quite apparent. It says, 'if any person shall falsely make, alter, forge or counterfeit.' Now, the arrangement and connection of these words, putting the 'false making' with other apt words to describe forgery, to-wit, altering, forging, counterfeiting, indicate its true



intent and meaning—that it is aimed at forgery and not at perjury. Again, ‘if any person shall falsely make, alter, forge or counterfeit any bond, bid, etc.’ Now, what is the false making of a bond or bid? Certainly not taking a false oath, because the execution of a bond or bid requires no oath. To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit, every sentence of which may be true in fact. Or he may actually make an affidavit, every sentence of which shall be false. It is the ‘**false making**’ which the Statute makes an offense, and this is forgery as described in all the elementary books. Hawkin says (Chap. 70, Sec. 1) ‘Forgery, by the common law, seemeth to be an offense in **falsely and fraudulently making or altering any matter** of record,’ etc. Chitty follows Hawkins, (Vol. 3, p. 1022) ‘Forgery may be defined to be the ‘false making.’ Blackstone defines it to be the **fraudulent making**—Vol. 4, p. 245. Russell (Vol. 2, p. 318) says not only the fabrication and false making constitute the crime, but the alteration, etc. Wharton quotes Blackstone and East, and calls it the **false making**—2 Whart., Sec. 1418. Roscoe the same. Crim. Ev. 487.’

## II.

The judgment or decision of the lower court is correct for the reason that the instruments mentioned in the Statutes construed by it do not include the affidavit, assignment, written guaranty and instruments set forth in each of the counts of the indictment. While it appears that the lower court gave a single reason for its decision sustaining the demurrers in this case, yet this court is not confined to a review merely of the single reason given by the lower court, but if in the construction of the Statutes under consideration there are other reasons why the judgment of the lower court should be sustained, this court has a right to so

decide so long as the decision is confined to the construction of the Statutes.

While this court has not the right to review questions presented to the lower court of general law which are not necessary for a proper construction of the Statutes in question, yet the Statute of 1907 vesting this court with jurisdiction in proceedings of this character clearly gives it the right to construe the Statutes in question and does not confine it alone to a review of the single reason for the decision of the lower court based upon its construction of the Statutes. In other words, if the lower court should decide that a Statute was invalid for one reason and the matter was presented for review in this court and it should be determined that the court was right in holding the Statute invalid but gave the wrong reason, certainly this court would affirm the judgment giving the correct reasons therefor. The object of the Statute of 1907 as held in the case of *United States v. Keitel*, 211 U. S. 371, was to confine this court to a review of decisions of the lower court concerning the **subjects embraced** within the clauses of the Statutes.

In *United States v. Stevenson*, 215 U. S. 190, it is held at page 196, that inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the Statute, at the instance of the government, in order to have a **final** and **determinative** construction of the Act.

In order to determine whether the Statutes in question when correctly construed include the instruments set forth in each count of the indictment, whether they be forged or merely untrue in their statements, it is necessary to ascertain their true character from a proper consideration of the Statutes providing for Soldiers' Additional homesteads. This subject is governed by Sections 2306 and 2307, Rev.

Stat. of U. S., and by reference thereto it will be observed that no affidavits of any kind are required. In fact, no provision is made by those sections for any rules or regulations of the Land Department in determining the validity of such claims. It is a matter of judicial knowledge, however, that the affidavit contained in this indictment has no legal significance in the Land Department. The officials of that department make their own independent investigation in the different departments by the examination of records, etc., and by correspondence, etc., with witnesses to ascertain the matters necessary to establish the claim. The affidavit of the claimant is unofficial in character and initiated no right to any tract of land, being mere ex-parte declarations under oath by persons having no official relation to the government.

In *Barnes v. Pourier*, 64 Fed. 14, the Court of Appeals for the Eighth Circuit, in an able opinion by Judge Sanborn, held that no affidavits were provided for or required under this Statute.

*Webster v. Luther*, 163 U. S. 331.

In *U. S. v. Gridley*, 186 Fed. 544, it is held at page 549, that the affidavits and assignments called scrip consisted of nothing more than ex-parte declarations under oath, by persons having no official relation to the government, of certain facts, which, if true, disclosed a right on the part of the claimant to receive title to a certain amount of land. The mere execution of the affidavit and the assignment of the claim initiated no right, either equitable or legal, to any tract of land. The right was of no greater dignity than that of a qualified citizen to pre-empt or enter under the homestead law a certain amount of land.

In *Robinson v. Lundrigan*, 178 Fed. 230, it is held that the validity of these rights is determined by the Land Department and that there is no entry until that time.

The purpose of such instruments as described in the indictment is apparent. Since these additional rights have been held by the courts to be vendible, the affidavits are merely for the purpose of furnishing ex-parte evidence of their validity to the different vendees of such rights. An affidavit of the genuineness of a promissory note by the maker for the purpose of better enabling its transfer or negotiation would be at least of equal dignity and validity as an affidavit of the character under consideration.

If no affidavits are required in such matters, then there can be no criminal offense based either upon the fact that said instruments were forged or were genuine and contained false statements. The instruments being unknown to the law, can not be made the basis of a criminal offense, and therefore a proper construction of Sections 28 and 29 of the Penal Code does not include the instruments contained in the indictment.

U. S. v. Dupont, 176 Fed. 823.

Even if there were rules and regulations of the Land Department providing for such instruments, still as they are not authorized by any law of the United States, such requirements cannot be made the basis of a criminal offense.

Williamson v. U. S., 207 U. S. 425.

Webster v. Luther, 163 U. S. 331 .

U. S. v. Eaton, 144 U. S. 677.

### III.

The indictment upon its face discloses that the alleged conspiracy was for the purpose of transferring additional homestead rights to third persons by means of the written instruments therein set forth. The written guaranty is conclusive of this question. Therefore are the Statutes upon which the indictments are based susceptible of a construction that would bring within its terms and spirit and de-

nounce as a crime against the United States such a transaction? In each and every count of the indictment the object of the transaction as alleged is solely to vend the additional right. If this alleged additional right be fraudulent or void for any reason, then the vendee purchasing the same from defendants would be defrauded and not the United States. The State law would govern in such matters and not any law of the United States. The Statutes under consideration would not apply when properly considered and construed. There would be no offense under the first three counts of the indictment and as it plainly appears that the instruments were not such as could be properly transmitted to a Land Office, the acts charged in the fourth count are not within the letter or spirit of the Statute. If the alleged intention be to transmit or cause to be transmitted such instruments to a Land Office, the intention when the entire transaction as contained in the indictment is considered, is too remote to be criminal under a fair and proper construction of this Statute.

If there be any fraudulent purpose disclosed in the indictments it is not to defraud the government, but individuals who may be allured into the purchase of such rights. The Statute does not include such conduct towards individuals.

In *Pettibone v. U. S.*, 148 U. S. 419, it is held that a conspiracy formed for the purpose of committing a crime against the State is no offense against the laws of the United States.

*U. S. v. Thompson*, 29 Fed. 86.

In *U. S. v. Fout*, 123 Fed. 625, it is held that proof that a defendant forged papers purporting to transfer the right to an additional homestead, which is a vendible right, and sold and delivered the same to another without any agreement with the purchaser with respect to the use to be made of

them, would not support an indictment under the third subdivision of the Section for transmitting such paper or procuring them to be transmitted to a land office with intent to defraud the United States.

The fourth count of the indictment in this case discloses on its face that defendants were charged with simply vending the additional right to a homestead. The overt act alleged conclusively establishes the fact that the papers were sold to the party named in the indictment with a guaranty of their validity. If the Statute includes instruments other than those forged when the same are to be transmitted to a land office, then a careful consideration of all the acts charged in the fourth count conclusively establishes the fact that the papers were simply to be sold in the market and that neither the making of the paper nor the selling of the paper in the first instance is any evidence of the "causing to be transmitted or procuring to be transmitted," within the meaning of the Statute. Neither of them is the proximate cause of transmission. The law is now well settled that these assignments of additional homestead rights are vendible, like commercial paper, certificates of stock, and may pass from hand to hand indefinitely. They may be left in circulation as a matter of trade or traffic indefinitely.

U. S. v. Fout, cited ante.

The decision and judgment of the lower court should be affirmed. *W.*

Respectfully submitted,

THOMAS M. SEAWELL,

OSCAR T. HAMLIN,

Counsel for Defendants in Error.